

812

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

THE ARIZONA AND NEW MEXICO RAILWAY
COMPANY, a Corporation,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

VOLUME I.
(Pages 1 to 304, Inclusive.)

Upon Writ of Error to the United States District Court of
the District of Arizona.

FILED

APR 29 1913

Pineapple and Orange Circuit
Court of Appeal
18



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A faint, light gray watermark of the United States Supreme Court building is centered in the background. The building is a neoclassical structure with a prominent portico of Corinthian columns supporting a classical entablature and a triangular pediment. The entire watermark is slightly out of focus.

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[1*] *In the District Court of the Fifth Judicial District of the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff above named complains of defendant and alleges:

I.

Plaintiff is a resident and citizen of the town of Clifton, Greenlee County, Arizona Territory, and has been such resident and citizen for 12 years last past.

That defendant, during the time herein mentioned has been, and yet is, a railroad corporation duly and legally incorporated under the laws of the Territory of Arizona and doing business as such in said Territory under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, and has, and maintains its general office, where all its records are kept, [2] in the town of Clifton, in Greenlee County, Territory of Arizona, and that it is an inhabitant and citizen of said town

*Page-number appearing at top of page of original certified Record.

of Clifton, in said Greenlee County, and is an inhabitant of said Fifth Judicial District of the Territory of Arizona, in which judicial district is situated said town of Clifton, and Greenlee County.

That the defendant is now, and was, on the day hereinafter mentioned engaged in the business of running and operating a railroad from said town of Clifton, to Hatchita, Territory of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and during the time herein mentioned was, and yet is, a common carrier of freight *or* passengers for hire, and during such time has owned, and yet owns, and operates said line of railway which extends from the town of Clifton, Territory of Arizona, southerly through the Territory of Arizona, to Hatchita, in the Territory of New Mexico, and as such common carrier operates freight and passenger trains for hire in and through the said territories of New Mexico and Arizona, on said line of railroad, between said points and was during the time and places herein mentioned engaged in interstate commerce on, over and through said line of railroad, and employed a large number of brakemen, and other employees, whose business it was to run and operate [3] said trains for hire, and were at the times and places herein mentioned employees of defendants and as such servants were engaged in interstate commerce on said railroad.

That on and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, actively engaged in said interstate commerce, in the service and employ of defendant

for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railroad yards of defendant, at the town of Clifton, on said railroad, which said engine at the time of the injury herein complained of, was owned by defendant, and actively engaged in interstate commerce for defendant and that plaintiff while in the actual discharge of his duties and employed in said interstate commerce, for defendant, was injured through the negligence and carelessness of defendant.

That defendant, at said town of Clifton, during the time herein mentioned, maintained and has a large number of tracks, turnouts, and switches for the storage of cars and for the making up of freight trains thereon and the same being the railway yards of defendants and are comprised within the said railroad of defendant and the same being used by defendant on its railroad in said interstate commerce; that said tracks, turnouts, and switches extend from the railroad depot of defendant at said town of Clifton, [4] southerly through said town of Clifton, a distance of about one-quarter mile, down to and past The Shannon Copper Company's store, to the railway bridge of defendant, which bridge crosses the San Francisco River at that point; that at about 800 feet north of said railroad bridge, on said railroad, there is a switch which leads off from the main track of said railroad and which said switch runs in a southerly direction, a distance of about one-half mile, to the smelter of the Shannon Copper Company, which said switch line of railroad running to said smelter, during the time herein mentioned, was

and yet is, owned, used and managed, by defendant, and for and during said time, was and yet is, a part of defendant's said line of railroad; that on the 15th day of March, 1911, there were in said railway yards at said Clifton, twelve foreign freight-cars, owned by Atchison, Topeka & Santa Fe Railway Company, C. & S. Ry. and of other railway companies, but of what other companies plaintiff does not know, which said 12 freight-cars were loaded with coke and merchandise and which said 12 freight-cars had been brought from some point beyond the Territory of Arizona, in and over defendant's said line of railroad to said town of Clifton and the same were consigned to said Shannon Copper Company; plaintiff says that on or about March 15th, 1911, [5] he was ordered and directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said switch to said Shannon Copper Company's smelter, and that in the removal of said freight-cars there were assisting the plaintiff, John T. Kelly, who was yardmaster for defendant, J. M. Kline, who was foreman for defendant, and T. J. St. Thomas, and Jesse Murphy, who were brakemen for defendant, all of which persons, including the plaintiff, were the crew of helpers and were employees, agents and servants of defendant in said railway service; that the line of said railroad switch, running to said Shannon Copper Company's smelter is over a steep grade, and was so much of an uphill that said switch engine could not take more than four of said freight-cars at any one trip up to said

smelter; and must move rapidly in order to pass the grade; that four of said cars has been taken up to said smelter and that the other eight thereof were on the main line of defendant's said railroad, just north of said railroad bridge, and four of which said cars had just been switched back south from said Shannon switch to a point of about 400 feet north of said railroad bridge, on defendant's said railroad and at the time when plaintiff was in the act of removing the other four of said freight-cars past the frog, and was passing out and over said Shannon switch, his engine being in motion, when the said four freight-cars, which had just been switched south to [6] said point and about 400 feet north of said railroad bridge, came running down northerly on said railroad track, a distance of about 200 feet, and the same ran against and struck the tender of the engine-cab, in which plaintiff was then and there sitting with great force and violence, thereby throwing plaintiff with great force and violence to the deck of said engine-cab, and violently partly throwing plaintiff out of said engine-cab and injuring the socket of his left hip, injuring his back and spine, and destroying the sight of his left eye; that that portion of said railroad, extending from said railroad bridge, to said Shannon switch, a distance of about 800 feet, is on an incline grade, sloping to the north, the incline thereof being to such an extent that cars placed thereon without being set to brakes or chocked would not remain, but would run from said bridge northerly to and pass said Shannon switch; that when said four freight-cars

had been switched to and brought to said point of about 400 feet north of said railroad bridge, on said railroad, it then and there became, and was, the duty of said brakemen and duty of said foreman J. M. Kline, who was then and there brakeman in charge of said freight-cars, to set the brakes on said freight-cars and chock the same so that they would not run north on said railroad, the said distance of about 200 feet to the point where plaintiff was moving the other four of said freight-cars; that while plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having [7] no warning, nor notice, nor knowledge, was struck by said freight-cars, which had been switched to and left at said point, or about 400 feet north of said railroad bridge, as aforesaid, and without any fault or contributory negligence on his part.

Plaintiff says that when said four freight-cars had been switched to and left at said point of about 400 feet north of said railroad bridge, that it then and there became, and was the duty of said J. M. Kline, said brakeman and other said brakemen to cause the brakes to be set on said freight-cars and the same securely chocked and fastened so that they would not leave the place whereon they had been switched to and placed, as aforesaid, and would not run north, down said track, to the point where plaintiff was switching and removing the other four of said freight-cars, but, on the contrary, said brakemen and said J. M. Kline, brakeman in charge, neglected to perform their duty in that regard, and neglected to set the brakes on any of the said cars which had

been switched to said point or about 400 feet north of said railroad bridge, as aforesaid, which it was their duty to do, and that he neglected to chock said cars, and neglected to secure said cars in any other way so that the same would not run north, as aforesaid and that on account of the carelessness and negligence of said J. M. Kline, and the other brakemen and employees to set said brakes and their negligence to chock said cars, or in any way to [8] secure the same, and that in consequence of their said carelessness and negligence, said cars ran north on said track, collided with and struck the cab of the engine in which plaintiff was sitting, and thereby caused said injury and damage to plaintiff, that defendant and its said agents and servants were negligent and careless in permitting and allowing said four freight-cars to escape and run north, as aforesaid, and violated their duty in that regard.

Plaintiff further says that if said defendant and its said servants and agents had set the brakes on said four cars, or had caused the same to be chocked, as it was their duty to do, that the same would not have run north on said railroad, and would not have struck the engine-cab in which plaintiff was sitting, and that plaintiff would not have received said injuries; that defendant, its servants and agents well knew that said freight-cars would not remain on said track at said point without the brakes having been set or said cars chocked, and very well knew at the time that said cars would not stay on said track at said point without the brakes being *without the brakes being* securely set or the same well chocked; that de-

fendant, its agents and servants, violated their duty and were negligent and careless in failing to set said brakes or chock said cars so as to prevent the same from running north and colliding with the switch engine which plaintiff was in charge of and operating, and that defendant and its said agents and [9] servants were careless and negligent in permitting said cars to so escape, run north and collide, as aforesaid, and were careless and negligent in allowing and permitting said cars to collide, as aforesaid; and plaintiff further says that before, and at the said time when said cars ran north and collided with said switch engine, as aforesaid, defendant and its said agents and servants then and there very well knew that said cars without having the brakes thereon set and chocked would run away, and that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection the defendant and its agents and servants could have known all of the above-stated facts; and that if defendant and its said agents had exercised due care, as it was then and there their duty so to do, said four freight-cars would not have escaped and run north and collided with the cab of said engine in which the plaintiff was then and there sitting, as aforesaid, and plaintiff would not have been injured and damaged as herein stated; but, on the contrary, plaintiff avers the fact to be, that on account of the failure of the defendant and its said agents and servants to perform their said duty, and on account of their negligence and carelessness in allowing and permit-

ting said freight-cars to escape and run north, as aforesaid, and in particular, the said carelessness and negligence of said J. M. Kline, the brakeman in charge of said freight-cars [10] to perform his duty, and his negligence in permitting said cars to collide with said engine, plaintiff was injured, and damaged, as aforesaid.

Plaintiff further says, that on March 15, 1911, at the time of said accident and injury, two of defendant's said servants, John T. Kelly and Jesse Murphy, had left their places of duty, were away and not attending to their duties in and about the moving of said cars, and that on account of their absence there was short and insufficient crew to perform said work and in this connection, plaintiff charges the fact to be, that it was negligence and carelessness on part of defendant and its servants to do or to attempt to perform said work by an insufficient number of servants, and that it was violation of the duties of said servants to remain away from and fail to perform their duties, and negligence and carelessness on the part of said servants to be absent from their post of duty, and which negligence and careless conduct of said absent servants aided in causing and bringing said accident and injury to plaintiff.

Plaintiff says that it was not his duty to set the brakes on said cars, nor to see that the same were chocked, or in any way secured, or fastened, and the plaintiff was ignorant of the fact that the brakes had not been set on said four cars, and was ignorant of the fact that the same had not been chocked so as to prevent their moving or colliding with said en-

gine until too late to avoid said accident, [11] and that on account of the obstruction of plaintiff's view by covered cars, and the noise of the engine and cars, he was unable to see said four cars when the same were running toward the engine which he was operating and that on account of said noise he was unable to hear the said approaching cars and could not discover that said four freight-cars were approaching said switch engine by the exercise of ordinary care.

Plaintiff further says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, said J. M. Kline, and defendant's said agents and servants, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of the chest and lungs, injury to his back and spine, serious shock and jar, four broken ribs, left hip greatly injured and by reason of said shock, jar and injury plaintiff has completely lost the sight of his left eye.

Plaintiff says that the cars he was moving and the cars which collided with said engine were in use, and had been in common and regular use, upon the lines of the said road of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident, being used in connection with other cars of the defendant in switching, making up and distribution of interstate commerce traffic over defendant's [12] said line of railroad.

That before the time that the said accident occurred both eyes of the plaintiff were strong and healthy, and his vision was clear and distinct, and that he was able to see perfectly; that on account of said accident, plaintiff has suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about; that plaintiff after said injuries, placed himself under the care of a skilled oculist, aurist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his wounds about his body, eyes, back and spine properly and safely cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, nor get well, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affectations.

That plaintiff while undergoing treatment for said injuries and up to said present time, has been totally unfit and unable to engage in any work, and by his enforced idleness for a period of nine months has lost about \$1,575.00 in wages; and his physical condition is such at present that it may be many months and years before he will be able to make a living for himself, if ever. That since said accident, and on account thereof, plaintiff has been obliged to be under medical treatment and at an expense of \$300.00, and [13] has been out for medical care and attention the further sum of \$800.00 and is still under the care of a physician; that plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years

of age, in good bodily health and condition, and never before had any sickness; that at the time of his injury he was earning, and was physically able to earn, the sum of \$165.00 for 28 days' work as a locomotive engineer, which salary the defendant was paying plaintiff at the date of said injury for this service as said locomotive engineer.

Plaintiff further represents and shows to the Court that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory of Arizona and Territory of New Mexico, and was at the time and place of the happening of said accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for recovery herein, both as to the liability of the defendant as a common carrier in the Territory of Arizona, as well as to the rule of evidence governing such actions, and the measure of damage which said act, on which plaintiff relies for recovery herein, as well as the fact that plaintiff and defendant are both residents and citizens of the said Fifth Judicial District of the Territory of Arizona.

[14] Plaintiff says that the defendant company, by its said acts, deeds, negligence and carelessness of its officers, servants and agents, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditures of money for medical treatment, loss of time, loss of wages, physical and mental pain, he has suffered damage by reason of the destruction and loss of the sight of his

left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, he has suffered damages to the amount of forty thousand dollars (\$40,000).

WHEREFORE, plaintiff demands judgment against defendant for \$1,575.00, loss of wages, \$1,100.00 expenditure on account of said medical treatment, and said \$40,000, aggregating the sum of \$42,675.00, for which sum and amount, plaintiff demands judgment against said defendant, together with the costs and disbursements of this action.

L. KEARNEY,
Attorney for Plaintiff.

[Endorsements]: (1.) No. 14. No. 29-A. In the District Court of the Fifth Judicial District of the Territory of Arizona, Having and Exercising the Same Jurisdiction in all Cases Arising Under the Constitution and the Laws of the United States as is Vested in the Circuit and District Courts of the United States. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Complaint. Filed at 9:30 A. M. January 18th, 1912. George H. Smalley, Clerk. L. Kearney, Clifton, Arizona, Attorney for Plaintiff.

[15] UNITED STATES OF AMERICA.

*In the District Court of the Fifth Judicial District,
of the Territory of Arizona.*

(Having and Exercising the Same Jurisdiction
Under the Constitution and Laws of the United
States as is Vested in the District and Circuit
Courts of the United States.)

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Summons.

Action brought in the District Court of the Fifth
Judicial District, Territory of Arizona.

The United States of America, Territory of Arizona,
Sends Greeting to The Arizona and New Mexico
Railway Company, a Corporation.

You are hereby summoned and required to appear
in an action brought against you by the above named
plaintiff in the District Court of the Fifth Judicial
District of the [16] Territory of Arizona, and an-
swer the complaint filed with the Clerk of this Court
at Globe in said District (a copy of which complaint
accompanies this summons) within twenty days (ex-
clusive of the day of service) after the service upon
you of this summons, if served in this county; but
if served out of the county and within this District,
then within thirty days; in all other cases forty days.

And you are hereby notified that if you fail to appear and answer the complaint as above required, the plaintiff will apply to the Court for the relief therein demanded; and costs and disbursements in this behalf expended.

Given under my hand and the seal of said District Court, at Globe, this 18th day of January, 1912.

GEORGE H. SMALLEY,
Clerk.

By _____,
Deputy Clerk.

[United States District Court, Fifth District,
Arizona—Seal]

[17] UNITED STATES MARSHAL'S
RETURN.

Office of the United States Marshal,
For the Territory of Arizona,—ss.

I hereby certify that I received the within summons on the 1st day of February, A. D. 1912, and personally served the same on the 1st day of February, A. D. 1912, on defendant named in said summons, the within named corporation, The Arizona and New Mexico Railway Company, by then and there delivering to A. T. Thompson, agent of said The Arizona and New Mexico Railway Company, by delivering it, and leaving with said A. T. Thompson personally, in the County of Greenlee, Arizona Territory, a copy of said summons, together with a true and correct copy of the complaint in this ac-

tion, and personally leaving same with said agent A. T. Thompson.

C. A. OVERLOCK,
Marshal.

By G. A. Tracey,
Deputy Marshal.

Fees \$3.00.

[Endorsements]: (3.) No. 14. United States of America District Court, District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Co., a Corp., Defendant. Summons. Filed March 23, 1912. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy Clerk.

[18] *The District Court of the Fifth Judicial District of the Territory of Arizona.*

Having and Exercising the Same Jurisdiction in All Cases Arising Under the Constitution and Laws of the United States as is Vested in the Circuit and District Courts of the United States.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

Comes now the Arizona and New Mexico Railway Company defendant in the above-entitled cause and for answer to complaint of plaintiff herein filed, de-

murs thereto and for grounds assigns the following:

I.

Because said complaint does not state facts sufficient to constitute a cause of action.

II.

For further answer defendant denies each and every allegation in said complaint contained. Having fully answered asks to be discharged with costs.

McFARLAND & HAMPTON,
Attorneys for Defendant.

[19] [Endorsements]: (2.) No. 14. 29-A.
Thomas P. Clark, Plaintiff, vs. The Arizona & New Mexico Ry. Co. Answer. Filed Feb. 14, 1912. 9 A. M. Geo. H. Smalley, Clerk.

[20] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,
Plaintiff,
vs.
THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Amended Complaint.

Plaintiff in this his amended complaint complains of the defendant, and alleges:

I.

Plaintiff is a resident and citizen of the town of Clifton, Greenlee County, State (formerly Territory) of Arizona, and has been such resident and

citizen for 12 years last past.

That defendant during the time herein mentioned has been, and yet is, a railroad corporation duly incorporated under the laws of the Territory (now State) of Arizona and doing business as such in said Territory (now State) under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, and has, and maintains its general office, where all its records are kept, in the town of Clifton, in Greenlee County, Territory (now [21] State) of Arizona, and that it is an inhabitant and citizen of said town of Clifton, in said Greenlee County, and is an inhabitant of said District Court of the United States for the District of Arizona, in which judicial district is situated said town of Clifton and said Greenlee County.

That defendant is now, and was, on the day hereinafter mentioned, engaged in the business of running and operating a railroad from said town of Clifton, to Hatchita, Territory (now State) of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and during the time herein mentioned was, and yet is, a common carrier of freight and passengers for hire, and during such time has owned, and yet owns, and operates said line of railway which extends from said town of Clifton, southerly through the Territory (now State) of Arizona, to Hatchita, in the Territory (now State) of New Mexico, and as such common carrier operates freight and passenger trains for hire in, on, over and through said line of railroad, between said points, and was during the times and

places herein mentioned engaged in interstate commerce on, over and through said line of railroad, and employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places herein mentioned employees of defendant and as such servants were engaged in interstate commerce on [22] said railroad for the defendant.

That on, and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, actively engaged in said interstate commerce, in the service and employ of defendant for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railroad yards of defendant, at said town of Clifton, on said railroad, which said engine at the time of the injury herein complained of, was owned by defendant and the same was actively engaged in said interstate commerce for defendant on its said railroad, and that plaintiff while in the actual discharge of his duties, and employed in said interstate commerce for defendant, was injured through the negligence of defendant and the carelessness of defendant's agents and servants as hereinafter set out.

That defendant, at said town of Clifton, during the time herein mentioned, maintained, and has a large number of tracks, turnouts, and switches for the storage of cars and for the making up of freight trains thereon, and the same being the railway yards of defendant and are comprised within the said railroad of defendant and the same being used by de-

fendant on its said railroad in said interstate commerce.

That said tracks, turnouts, and switches extend from the railroad depot of defendant on its said railroad at said [23] town of Clifton, southerly through said town of Clifton, a distance of about one-quarter mile, down to, and past the Shannon Copper Company's store, to the railway bridge of defendant on its said railroad, which bridge crosses the San Francisco River at that point; that at a point of about 800 feet north of said railroad bridge, on said railroad, there is a switch connecting a spur line of railroad which leads off from the main track of defendant's said railroad and which runs in a southerly direction from said switch, a distance of about one-half mile, to the smelter of the Shannon Copper Company, which said spur line of railroad during the time herein mentioned was the property of said Shannon Copper Company, but that said spur line of railroad during the time herein mentioned was in the use and management of defendant, as a part of defendant's said line of railroad.

That on the 15th day of March, 1911, there were in said railroad yards at said Clifton, twelve foreign freight-cars, owned by Atchison, Topeka & Santa Fe Railway Company, C. & S. Ry., and of other companies, but of what other companies plaintiff does not know, which said 12 freight-cars were loaded with coke and merchandise, and which said 12 freight-cars had been brought from some point beyond the Territory (now State) of Arizona, in and over defendant's said line of railroad to said town of Clif-

ton, and the same [24] were consigned to said Shannon Copper Company.

Plaintiff further says that on or about March 15th, 1911, he was ordered and directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said switch spur line of railroad to said Shannon Copper Company's smelter, and that in the removal of said 12 freight-cars there were assisting plaintiff the following named persons: John T. Kelly, yardmaster; J. M. Kline, foreman; T. J. St. Thomas and Jesse Murphy, brakemen—all of which said persons, including plaintiff, were the crew of helpers and were then and there employees, agents and servants of defendant, for hire, in said railway service; that the line of said spur railroad from said switch, running to said Shannon Copper Company's smelter is over a steep grade, and so much uphill that said switch engine could not take more than four of said freight-cars at any one trip to said smelter, and must move rapidly in order to pass said grade; that four of said cars had been taken up to said smelter and that the other eight thereof were on the main line of defendant's said railroad, just north of said railroad bridge, and four of which said cars had just been switched back south from said Shannon switch to a point of about 450 feet north of said railroad bridge, on defendant's said [25] railroad, and at the time when plaintiff was in the act of removing the other four said foreign freight-cars past said frog, and was passing out and over said switch, and about to

enter said spur line of railroad, his said engine in motion, when said four foreign freight-cars which had just been switched south to said point of about 450 feet north of said railroad bridge, came running down northerly on the main line of defendant's said railroad track, a distance of about 200 feet, and the same ran against and struck the tender of the engine-cab in which plaintiff was then and there sitting with great force and violence, throwing plaintiff with great force and violence to the deck of said engine-cab, and violently throwing plaintiff partly out of said engine-cab, and thereby injuring the socket of plaintiff's left hip, injuring his back and spine, and destroying the sight of his left eye.

Plaintiff further says, that the portion of defendant's said railroad, extending from said railroad bridge to said switch, a distance of about 800 feet, is an incline grade, sloping to the north, the incline thereof being to such an extent that cars placed thereon without being set to brakes, or well chocked, would not remain thereon, but would run from said bridge northerly on said railroad and would pass said switch.

[26] That when said four foreign freight-cars had been switched to and brought to said point of about 450 feet north of said railroad bridge, on defendant's said railroad, it then and there became, and was, the duty of said brakemen, and the duty of said foreman, J. M. Kline, who was then and there brakeman in charge of said freight-cars, to set the brakes on said freight-cars and chock the same so that they would not run north on said railroad, the said dis-

tance of about 200 feet to the point where plaintiff was moving the other four of said foreign freight-cars.

That while the plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having no warning, nor notice, nor knowledge, was struck by said four foreign freight-cars, which had been switched to and left at said point of about 450 feet north of said railroad bridge, as aforesaid, and without any fault or contributory negligence on his part.

Plaintiff says that when said four foreign freight-cars had been switched to and left at said point of about 450 feet north of said railroad bridge, that it then and there became, and was, the duty of said J. M. Kline, said brakeman, and the other said brakemen, to cause the brakes to be set on said freight-cars and the same securely chocked and fastened so that the same would not leave the place whereon they had been switched to and placed, and would not run north, [27] down said track, to the point where plaintiff was switching and removing the other four of said freight-cars, but on the contrary, said brakemen, and said J. M. Kline, brakeman in charge of said cars, each and all, neglected to perform their duty in that regard, and neglected to set the brakes on any of the said cars which had been switched to said point of about 450 feet north of said railroad bridge, as aforesaid, which it was their duty to do, and that they neglected to chock said cars, and neglected to secure said cars in any other way so as to prevent their running north, as aforesaid, and that on account of

the carelessness and negligence of said J. M. Kline, and the other said brakemen and employees of defendant, to set said brakes, and their neglecting to chock said cars, or in any other way to secure the same against running north as aforesaid, and that in consequence of the negligence of defendant and its said agents and servants to set the brakes on said cars, and their negligence in any way to secure the same, that said four cars ran north on said track, collided with and struck the cab of the engine in which plaintiff was sitting, and thereby caused said injuries and damage to plaintiff.

That defendant and its said agents and servants were negligent and careless in permitting and allowing said four foreign freight-cars to escape and run north, as aforesaid, and violated their duty in that regard.

[28] Plaintiff further says that since said accident he has learned that the brakes on one or two of said cars which came down said track and collided with said engine were old, worn, and defective and insecure, but notwithstanding the said two or three defective brakes, there were yet five good and sufficient brakes on said four cars at the time of said accident, and that if defendant and its said servants had used ordinary care they could *easily discovered* said defective brakes, as such defects were open and apparent and discoverable upon the slightest inspection, and that all such defects could have been easily remedied and guarded against, and that defendant and its said servants were negligent and careless in the discharge of their duty in failing to inspect said

brakes, and were careless and negligent in the discharge of their duty in failing to properly set said brakes, and in failing to chock said cars, so as to prevent the same from running and colliding as aforesaid.

Plaintiff further says, that the knuckles, knuckle pin, and lock pin, and other coupling apparatus on said four cars which collided with said engine was defective at the point where the same were uncoupled from the other said four cars, and that such defect was in this particular, that the knuckles, knuckle pin and lock pin at the head of the draw-bar worked hard, which prevented the knuckle clasp from swinging readily, so that when the pin was raised for uncoupling that there was a tendency to give those four cars [29] which came down and collided as aforesaid, a jerk forward, slightly causing them to follow down the track to the point where said accident occurred.

That the defect in said uncoupling apparatus was open and apparent on the most casual observation and easily discoverable upon the slightest inspection, and could have been easily remedied and made safe; that defendant and its said servants were negligent and careless in that they made no inspection of said uncoupling apparatus, and that it was carelessness and a negligence on the part of the defendant and its said servants to use said uncoupling apparatus in said defective condition, and in this connection, plaintiff further avers the fact to be, that if defendant and its said agents and servants had used due care as it was their duty so to do, in setting said

brakes, or in chocking said cars, that the same would not have ran down said track and collided with said engine and that said accident would not have occurred, notwithstanding any defect in said coupling or uncoupling apparatus.

Plaintiff further says that if said defendant and its said servants and agents had set the brakes on said four cars, or had caused the same to be chocked, as it was their duty to do, that the same would not have run north on said railroad, and would not have struck the engine-cab in which plaintiff was sitting, and that the plaintiff would not have received [30] said injuries; that defendants, its servants and agents well knew that said freight-cars would not remain on said track at said point without the brakes having been set or said cars well chocked, and very well knew at the time that said cars would not stay on said track without being secured by chocks or brakes.

That defendant, its agents and servants, violated their duty, and were negligent and careless in failing to set said brakes or in chocking said cars so as to prevent the same from running north and colliding with said switch engine which plaintiff was in charge of and operating; and that the defendant and its said agents and servants were careless and negligent in permitting said four cars to so escape and run north and collide, as aforesaid, and were negligent and careless in allowing and permitting said cars to collide, as aforesaid.

Plaintiff further says that before, and at the time when said cars run north and collided with said

switch-engine, as aforesaid, that defendant and its said agents and servants then and there very well knew that said cars without having the brakes set thereon and chocked, would run away, and that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection, the defendant and its said agents and servants could have known all of the above-stated facts.

[31] And that if defendant and its said servants had exercised due care as it was then and there their duty so to do, said four freight-cars would not have escaped and run north and collided with the cab of said engine in which plaintiff was then and there sitting, as aforesaid, and that plaintiff would not have been injured and damaged as herein stated; but, on the contrary, plaintiff avers the fact to be, that on account of the failure of defendant and its said agents and servants to perform their said duty, and on account of their negligence and carelessness in allowing and permitting said freight-cars to escape and run north, as aforesaid, and in particular the negligence of said J. M. Kline, the brakeman in charge of said cars, to perform his duty, and his negligence in failing to set said brakes and permitting said cars to run and collide with said engine, plaintiff was injured, and damaged, as aforesaid.

Plaintiff says that it was not his duty to set the brakes on said cars, nor to see that the same were chocked, or in anyway secured, or fastened, and that plaintiff was ignorant of the fact that the brakes had not been set on said four cars, and was ignorant

of the fact that the same had not been chocked so as to prevent their moving or colliding with said engine until too late to avoid said accident, and that plaintiff was ignorant of any defect that might [32] exist in said brakes or coupling apparatus; and that on account of the obstruction of plaintiff's view by the covered cars, and the noise of the engine and cars, he was unable to see said four cars when the same were running toward the engine which he was operating, and that on account of said noise he was unable to hear the said approaching said four cars and could not discover that said four cars were approaching said switch engine by the exercise of ordinary care.

Plaintiff further says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, said J. M. Kline, and defendant's said agents and servants, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of the chest and lungs, injury to his back and spine, serious shock and jar, four broken ribs, left hip greatly injured, and that by reason of said shock and jar, plaintiff has completely lost the sight of his left eye.

Plaintiff says that the cars he was moving and the cars which collided with said engine were in use, and had been in common and regular use, upon the lines of the said road of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident being used in connection with other cars of the de-

fendant in switching, making up and distribution [33] of interstate commerce traffic over defendant's said line of railroad.

That before the time that the said accident occurred, both eyes of the plaintiff were strong and healthy, and his vision was clear and distinct, and he was able to see perfectly; that on account of said accident plaintiff has suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about; that plaintiff after said injuries, placed himself under the care of a skilled oculist, aurist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his wounds about his body, eyes, back and spine, properly and safely cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, nor get well, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affectations.

That plaintiff, while undergoing treatment for said injuries and up to the present time, has been totally unfit and unable to engage in any work, and by reason of his enforced idleness for a period of nine months has lost about \$1,575.00 in wages; and his physical condition is such at present that it may be many months and years before he will [34] be able to make a living for himself, if ever.

That since said accident and on account thereof, plaintiff has been obliged to be under medical treatment and at an expense of \$300.00, and had been out

for medical care and attention the further sum of \$800.00 and is still under the care of a physician; that plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years of age, in good bodily health and condition, and never before had any sickness; that at the time of his injury he was earning, and was physically able to earn, the sum of \$175.00 for 28 days' work as a locomotive engineer, which salary the defendant was paying plaintiff at the date of said injury, for his services as said locomotive engineer.

Plaintiff further represents and shows to the Court, that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory (now State) of Arizona and in the Territory (now State) of New Mexico, and was at the time and place of the happening of said accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the Territory (now State) of Arizona, as well as to the rule of evidence governing such actions, and the measure of damage, which said act, on which plaintiff relies for recovery herein, as well as the [35] fact that plaintiff and defendant are both residents and citizens of said District Court of the United States for the District of Arizona.

Plaintiff says that the defendant company, by its said acts, deeds, negligence and carelessness of its

officers, servants and agents, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditure of money for medical treatment, loss of time, loss of wages, physical and mental pain, he has suffered damage, by reason of the destruction and loss of sight of his left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, he has suffered damages to the amount of forty thousand (\$40,000.00) dollars.

WHEREFORE, plaintiff demands judgment against defendant as follows: \$1,575.00 for loss of wages; \$1,100.00 expenditure on account of said medical treatment; and, said \$40,000.00—aggregating the sum of \$42,675.00, for which sum and amount, plaintiff demands judgment against said defendant, together with the cost and disbursements of this action.

L. KEARNEY,
Attorney for the Plaintiff.

[36] [Endorsements]: (4) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Amended Complaint. Filed April 4th, 1912, at 9 A. M. Allan B. Jaynes, Clerk. By W. E. Boggs, Deputy. L. Kearney, Attorney for Plaintiff, Clifton, Arizona.

Service by copy admitted this 1 day of April, 1912, at Clifton, Arizona.

McFARLAND & HAMPTON,
Attorneys for Defendant.

[37] *In the District Court of the United States for
the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Affidavit of Nonwaiver of Right of Transfer.

State of Arizona,

County of Greenlee,—ss.

L. Kearney, being duly sworn, deposes and says: that he is attorney of record for the above-named plaintiff in said court and cause; that on April 5th, 1912, at Clifton, Greenlee County, State of Arizona, he personally served all of the hereto annexed papers on the above-named defendant, by then and there delivering to and leaving with McFarland & Hampton, in person, true copies thereof; that said McFarland & Hampton, at the time of said service were the attorneys for defendant in said cause and court; that on April 6th, 1912, all of the said annexed papers were lodged with the Clerk of the Superior Court of the County of Gila, State of Arizona, and the same were, on April 8th, 1912, duly presented to the Judge of the Superior Court of said Gila County, with request that he make the order requested in said annexed papers, who thereupon declined to make the order for removal requested in the annexed petition, on the ground as claimed by said Superior Judge,

that all the records and files of [38] said cause had prior thereto been transferred, that the same never were lodged in nor became a part of the records of said Superior Court, and that he had no jurisdiction of said action, and thereupon returned all of the hereto annexed papers to this affiant.

L. KEARNEY.

Subscribed and sworn to before me this 11th day of April, 1912.

My commission expires June 28, 1913.

[Seal]

EUGENE SCHWAB,

Notary Public.

[39] *In the Superior Court of the County of Gila,
State of Arizona.*

“COPY.”

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Notice of Application for Removal to Federal Court.

To Messrs. McFarland & Hampton, Attorneys for
Defendant.

Dear Sirs: Please take notice, that on the annexed petition, which is herewith served upon you, I will move the Judge of the Superior Court of the County of Gila, State of Arizona, at the courthouse in the city of Globe, Gila County, Arizona, on April 8th,

1912, at the hour of ten in the forenoon, or as soon thereafter as counsel can be heard, for an order transferring, removing and transmitting the above-entitled action, together with all process, pleadings, and the entire record of said cause, to the District Court of the United States for the District of Arizona, and that the clerk make the proper certificate and file the same in said Federal Court that he has transferred the entire record of said cause to said Federal Court.

Dated April 4th, 1912.

[40] L. KEARNEY,

Attorney for the Plaintiff, Clifton, Arizona.

[Order Transferring Cause to U. S. District Court.]

*In the Superior Court of the County of Gila, State
of Arizona.*

THOMAS P. CLARK,

Plaintiff,

VS.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

In the Matter of the Removal of Said Cause to District Court of the United States for the District of Arizona.

It appearing to the Court from the petition filed, which is duly verified, and the same is hereto annexed, that plaintiff is entitled to a removal of said cause on the grounds stated in said petition, and that

all the records and files in said cause ought to be transferred as demanded in said petition.

THEREFORE, it is accordingly ordered that this cause, all the records and files therein, and the same is hereby, removed and transferred to the District Court of the United States, for the District of Arizona, and the Clerk of said Superior Court of Gila County is hereby ordered to cause all records and files of said cause, including this order and said annexed petition, to be forthwith transferred to said District Court for Arizona.

[41] Dated April —, 1912.

Judge of Said Superior Court.

State of Arizona,
County of Gila,—ss.

I, J. M. Wentworth, Clerk of the Superior Court of the County of Gila, State of Arizona, do hereby certify that the above is the original order of the Judge of said Superior Court and his genuine signature thereto attached; and I further certify that all records, papers and files in the said cause and described in said petition, were on March 19th, 1912, duly transferred to said District Court of the United States for the District of Arizona, and that the above order together with said petition hereto annexed, is hereby transferred to said Federal Court, at Phoenix, Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court,

at the city of Globe, State of Arizona, on this ____
day of April, A. D. 1912.

Clerk of Said Superior Court.

[42] *In the Superior Court of the County of Gila,
in the State of Arizona.*

State of Arizona,
County of Greenlee,—ss.

THOMAS P. CLARK,

Plaintiff,

VS.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Application for Removal of this case to the District Court of the United States for the District of Arizona.

To the Honorable the Superior Court of the County
of Gila, State of Arizona:

The petition of Thomas P. Clark, the above-named plaintiff, alleges and respectfully shows to this Court, that is to say: (1) That your petitioner on or about January 19th, 1912, as plaintiff, filed a certain suit in the District Court of the Fifth Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, in which action your petitioner was the plaintiff, the said, "The Arizona and New Mexico

Railway Company, a corporation," was the defendant; that on or about January 19th, 1912, the complaint therein was lodged and filed in the office of the Clerk of said the District Court of the Fifth Judicial District of the Territory of Arizona, [43] at Globe, Arizona, and on the same day, the Clerk of said last-named court, Hon. George H. Smalley, duly issued a summons in said action, and which said action was designated as No. 29-A, on the Federal side of the last-named court; that said summons was duly served on said defendant at said Greenlee County, and it thereafter filed in said last-named court its answer.

That said plaintiff is and was at the time of bringing said suit a resident and a citizen of Greenlee County, Arizona, in the said Fifth Judicial District, and that said defendant is and was at the time of bringing said suit a corporation duly organized and existing under the laws of the Territory (now State) of Arizona, domiciled at Clifton, in said Greenlee County, and a citizen of the Territory (now State) of Arizona, a resident and citizen of said Fifth Judicial District of the Territory (now State) of Arizona, and is yet such corporation, citizen and resident.

(2) That said suit is of a civil nature and arises under the laws of the United States, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum and value of more than Five Thousand (\$5,000) Dollars, all of which will hereinafter more fully appear.

(3) That said plaintiff, this petitioner, alleges in

his said complaint, filed in said suit in the said District [44] Court of the Fifth Judicial District of the Territory of Arizona, among other things, that said defendant is and was on the day thereinbefore mentioned engaged in the business of running and operating a railroad from the town of Clifton, in said Greenlee County, Arizona, to Hatchita, Territory of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, is a railway corporation, and during the times therein mentioned the defendant was, and yet is, a common carrier of freight and passengers for hire, and as common carrier operates freight and passenger trains for hire, in and through the said territories, on said line of railroad, between said points, and was during the time and places therein mentioned engaged in interstate commerce on, over and through said line of railroad, and that defendant employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places therein mentioned employees of the defendant and as such servants were engaged in said interstate commerce for defendant on its said railroad.

That it is further alleged in said complaint that on or about March 15th, 1911, said plaintiff was employed by defendant as a locomotive engineer on said railroad, in the service and employ of defendant for hire, and as such locomotive engineer had charge of and was running a switch engine for defendant, in the railway yards of defendant, at said [45] town of Clifton, on said railroad, engaged in said inter-

state commerce for the defendant, and that plaintiff while in the actual discharge of his duties and employed in said interstate commerce, on said railroad, for defendant, was injured through the carelessness and negligence of defendant and its servants.

That it further alleged in said complaint, that during the time mentioned in said complaint, that defendant maintained a large number of tracks and switches for the storage of cars and the making up of trains thereon, and the same being a part of the said railroad of defendant; that from the defendant's railroad depot said railroad at said town of Clifton, at a point of about a quarter of a mile therefrom, southerly in said town of Clifton, on said railroad, there is a spur line of railroad leading off from defendant's said railroad, in a southwesterly direction a distance of about three-quarters of a mile to the Shannon Copper Company's smelter, which is known as the Shannon switch, which switch is about 800 feet north of the defendant's railroad bridge which crosses the San Francisco River, in said town, at said point; that the defendant's said line of railroad from said railroad to said Shannon switch is a grade, sloping *the* north and the grade thereof being to such an extent that cars placed thereon without [46] having the brakes set or the same well chocked, will not remain on that portion of said track, but will run north on said railroad from said bridge, past said Shannon switch, a distance of over 800 feet; that on March 15th, 1911, there were in the said railroad yards of defendant at said Clifton 12

foreign freight-cars, owned by A. T. & S. F. Ry. Co. and C. & S. Ry., which said 12 cars were loaded with coke and merchandise, which were brought from some point beyond the Territory (now State) of Arizona, over defendant's said line of railroad, and the same were consigned to the said Shannon Copper Company; that plaintiff on March 15th, 1911, was directed by defendant and its duly authorized agents to cause said 12 foreign freight-cars to be removed from defendant's said yards, and the same taken over said Shannon switch to said Shannon Copper Company's smelter; that in the removal of said freight-cars there were assisting plaintiff the following persons: John T. Kelly, yardmaster; J. M. Kline, foreman; T. J. St. Thomas and Jesse Murphy, brakemen, who were the crew of helpers and employees of defendant in said railroad service; that said spur line of railroad from said Shannon switch to said Shannon Copper Company's smelter is up a steep grade and so much of a steep grade that said switch engine was unable to take more than four of said freight-cars at any one trip; that four of said freight-cars had been taken up to said smelter and the other eight remained on said track between said Shannon switch and said [47] railroad bridge and on the second trip said eight cars had been brought down by said switch engine within about 450 feet to the south of said Shannon switch when four of them were cut off to take the same up to said Shannon Copper Company's smelter, which left four of said freight-cars on defendant's main line of railroad within 200 feet to the north of said Shannon

switch, and at a time when plaintiff was in the act of moving the said four freight-cars which had just been cut off, and was in the act of passing out over the frog and going onto said spur line, his said engine in motion, the said four freight-cars which had been left on the main line just north of said Shannon switch and within 200 feet of the same, came running down said grade and ran against the tender of the engine in which plaintiff was then and there operating and striking the same with great force and violence, throwing plaintiff to the deck of said engine-cab and thereby injuring his back and spine, breaking four of his ribs, and destroying the sight of his left eye.

That plaintiff further alleges in his said complaint that when said four cars had been cut off as aforesaid and left on said incline grade, about two hundred feet or more south of said switch that it then and there became the duty of the said foreman and said brakemen to set the brakes of said cars and to chock the same so that they would not run [48] down said track and collide with the engine on which plaintiff was operating, and that it was negligence of said defendant and its said foreman and brakemen to leave said four cars without the brakes having been set thereon and same secured against running away and colliding as aforesaid, and that said servants neglected and violated their duty in failing to secure said cars by brakes or proper chocks; that while plaintiff was in the exercise of due care for his own personal safety, without negligence or fault on his part, and having no warning, nor notice, nor

knowledge, was struck by said four freight-cars, without any fault or contributory negligence on his part; that defendant and its said brakemen very well knew that said freight-cars would not remain on said track without having the brakes set thereon and violated their duty in failing to set the brakes thereon, and very well knew that plaintiff or some other employee would be killed or seriously injured by such a collision, or by the exercise of ordinary care and inspection could have known all of the above facts, and that if said brakemen had exercised due care as it was their duty so to do, said four freight-cars would not have escaped and collided with said engine and plaintiff would not have been injured and damaged as aforesaid, but on the contrary on account of the negligence and carelessness of said brakemen and servants of defendant to perform their said duty, plaintiff [49] was injured as aforesaid; that plaintiff says it was not his duty to set said brakes and that he was ignorant that the brakes had not been set thereon, and that on account of his view being obstructed by covered cars he was unable to see said approaching four cars and on account of the noise of his engine he was unable to hear the same and could not discover that the same were approaching said engine by the exercise of ordinary care.

Plaintiff further alleges in said complaint, that each of the aforesaid negligent acts and omissions on the part of defendant and its said servants, was the direct and proximate cause of said injury and accident and plaintiff's consequent injuries, for

which the defendant is liable; that on account of said injury plaintiff has expended large sums of money, enforced idleness, rendered unable to earn a living for himself, and that before said injury he was a strong and healthy man, his eyesight was strong and his vision clear; that at the time of said injury he was able to earn and was earning a salary of \$175 for 28 days' work as said locomotive engineer, and that on account of said injury he has been damaged in the sum of \$42,675, which is demanded against defendant in said complaint;

It is further alleged in said complaint, that on or about the 22d day of April, 1908, the Congress of the [50] United States of America passed and approved what is known as the "Federal Employer's Liability Act" which act is now in full force and effect in the Territory (now State) of Arizona, and was at the time and place of the happening of said accident and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the Territory of Arizona, as well as the rule of evidence governing such actions, and the measure of damages, which said act, on which plaintiff relies for recovery herein, as well as the fact that plaintiff and defendant are both residents and citizens of said Fifth Judicial District of the Territory of Arizona;

That in said complaint, on account of said facts, and the sustaining of the said injuries, plaintiff demands judgment against said defendant for the sum of Forty-two Thousand Six Hundred and Seventy-

five Dollars, together with costs of suit.

Your petitioner further shows to this Court, that the said Territory of Arizona, by virtue of an act of the said Congress, passed and approved June 20th, 1910, and proclamation of the President of the said United States, became the State of Arizona on February 14th, 1912, when said suit was pending in said Fifth Judicial District of the said Territory of Arizona, and the said complaint and answer [51] were on file with the clerk of said District Court at Globe, Arizona.

That the said act admitting Arizona as a state, by the provisions of Sec. 31 thereof, created the State of Arizona one federal jurisdiction, attached to the Ninth Judicial Circuit and providing that one district judge shall be appointed by the President of the United States for said district of Arizona.

That Sec. 33 of the enabling act admitting Arizona as a State, provided among other things, that the said district court so created for the State of Arizona, shall have jurisdiction to hear and determine all trials and proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said Territory at the date of its admission as a State, the case being such that, under the laws of the United States touching the jurisdiction of Federal courts, it might properly have been begun in or (as a separate controversy or otherwise) removed to said Circuit or said District Court had they been established when the litigation of such case or controversy was commenced. Should such case or

controversy be such that, if begun within a State, it would have fallen within the exclusive cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to one or the other of said courts sitting within said State of Arizona, [52] with due regard for the general provisions of law defining their respective jurisdiction; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for the removal of cases from State or Federal courts, and no later than sixty days after the lodgment of the record of such case or controversy in the proper court of the State as herein provided.

Your petitioner further states that the record of his said case was lodged in the said Superior Court of the County of Gila, on or about February 19th, 1912, and that he further says it is such a case as falls within the concurrent, but not the exclusive jurisdiction of said District Court for Arizona, and that he is entitled to have the record of his said case removed to the District Court of the United States for the District of Arizona.

Your petitioner therefore prays this honorable Court to proceed no further herein, except to make an order of removal as required by law, and to cause the record in said case to be removed into the said District Court of the United States for the District

of Arizona, according to the statute in such case made and provided.

And your petitioner will ever pray.

[53] THOMAS P. CLARK,
Petitioner.

L. KEARNEY,

Petitioner's Attorney, Clifton, Arizona.

State of Arizona,

County of Greenlee,—ss.

Thomas P. Clark, being duly sworn, deposes and says, that he is the petitioner above named; that he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

THOMAS P. CLARK.

Subscribed and sworn to before me this 4th day of April, A. D. 1912.

My commission expires February 15th, 1916.

[Seal]

L. KEARNEY,

Notary Public.

[54] [Endorsements]: (5.) No. 14. In the District Court of the United States, for the District of Arizona. Thomas P. Clark, vs. The Arizona and New Mexico Railway Company, a Corporation. Petition for Order of Transfer of Cause, and Certificate Thereof, and Affidavit of Denial of the Application. Filed April 13th, 1912, at 10:00 A. M. Allan B. Jaynes, Clerk. W. E. Boggs, Deputy.

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Plaintiff in this his second amended complaint, complains of defendant and alleges:

1.

Plaintiff during the time mentioned herein has been, and is, a resident and citizen of the town of Clifton, State (formerly Territory) of Arizona.

That defendant during the time herein mentioned has been, and yet is, a railroad corporation, duly incorporated under the laws of the Territory (now State) of Arizona, and doing business as such in said Territory (now State), under its corporate name, "The Arizona and New Mexico Railway Company," and that it is domiciled at, has and maintains [55] its general office, where all its records are kept, at the town of Clifton, in Greenlee County, Territory (now State) of Arizona, and is an inhabitant and citizen of said town, in said judicial district.

2.

That defendant is now, and was, on the day herein-after mentioned, engaged in the business of running and operating a railroad from said town of Clifton,

to Hatchita, Territory (now State) of New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and that defendant was, and yet is, a common carrier of freight and passengers for hire, and as such common carrier operates freight and passenger trains for hire, in, on, over and through said railroad, between said points, and during the time herein mentioned was engaged in interstate commerce on, over and through said line of railroad, and that it employed a large number of brakemen, and other employees, whose business it was to run and operate said trains for hire, and were at the times and places herein mentioned employees of defendant and as such servants were engaged in said interstate commerce on said railroad for the defendant.

3.

That at said town of Clifton, during the time herein mentioned, defendant has owned and maintained, as a part of its said railroad, a large number of tracks, turnouts and switches for the storage of cars, and for the making [56] up of trains thereon, the same being the yards of defendant;

That said tracks and switches extend from defendant's railroad depot at said town of Clifton, southerly through said town, a distance of about one-quarter mile, to a point where defendant's railroad bridge crosses the San Francisco River;

That at a point of about 800 feet north of said railroad bridge, on said railroad track, there is a switch railroad which runs in a southerly direction a distance of about one-half mile, to the Shannon

Copper Company's smelter; that said switch line of railroad during the time herein mentioned was in the use of defendant, as a part of its said railroad; that said switch line of railroad is up a steep grade, and that the grade thereof being so steep that the engine herein mentioned was unable to move more than four cars at any one trip over the same, and must move rapidly in order to pass said grade.

That that portion of defendant's said railroad track, from said railroad bridge to said switch, said distance of about 800 feet, is downgrade, sloping to the north, the incline thereof being to such an extent that cars placed thereon, without brakes set on the cars, or the same well chocked, would not remain on said track, but would run northerly to and past said switch, and that this portion of defendant's said railroad track was in such condition at the time [57] of the accident and injury hereinafter mentioned.

4.

That on March 15th, 1911, there were in said railroad yards, at said Clifton, twelve foreign freight-cars, which were in part owned by Atchison, Topeka & Santa Fe Railway Company, and in part owned by Colorado and Southern Railway Company, and other railway companies, but of what other companies plaintiff does not know; that said foreign freight-cars were loaded with coke and merchandise, and the same had been brought in from some point beyond the Territory (now State) of Arizona on and over defendant's said railroad, by defendant, to said town of Clifton, and which said foreign freight-cars

were consigned to said Shannon Copper Company.
5.

That on and prior to March 15th, 1911, plaintiff was employed by defendant as a locomotive engineer on said railroad, engaged in said interstate commerce for defendant, in the service and employ of defendant for hire, and as such locomotive engineer had charge of, and was running a switch engine for defendant, in said railroad yards of defendant, at said town of Clifton, which said engine at the time of the injury herein complained of, was owned by defendant and in use of said interstate commerce.

6.

Plaintiff says that on or about March 15th, 1911, as [58] such locomotive engineer, he was ordered and directed by defendants and its duly authorized agents, to take said switch engine and remove said 12 foreign freight-cars from defendant's said yards and take the same over said switch railroad to said Shannon Copper Company's smelter;

That in the removal of said 12 foreign freight-cars there were a part of the time assisting plaintiff, the following named persons: John T. Kelly, yardmaster; J. M. Kline, foreman; G. F. Chambers, fireman; T. J. St. Thomas and Jesse Murphy, brakemen—who were the crew of helpers, and all of whom were then and there employees, agents and servants of defendant, in the hire of defendant, in said railroad service.

That in said service, in the removal of said cars, it was the duty of said employees to warn plaintiff of any approaching cars which might collide with

said switch engine, warn plaintiff of all dangers, and to give signals to plaintiff to start, run and stop said switch engine, and it was the duty of plaintiff to obey said signals.

7.

That plaintiff and said crew began the removal of said 12 freight-cars on said March 15th, 1911, and eight of said cars were brought down to a point of about 450 feet north of said bridge and 200 feet south of said [59] switch, when four thereof were uncoupled and left on said railroad track at said point, and four thereof were coupled to said switch engine and by the plaintiff were being moved down defendant's said track to enter said switch and take the same to Shannon Copper Company's smelter.

That when said four cars had been uncoupled and left at said point of about 200 feet south of said switch, that it then and there became, and was, the duty of said J. M. Kline, T. J. St. Thomas and John T. Kelly, the persons in charge of the same, to cause the brakes to be set on said four freight-cars, left at said point, and to securely chock and fasten the same, so that they would not run down said track, to the point where plaintiff was removing the other four of said freight-cars onto said switch, but on the contrary, said J. M. Kline, T. J. St. Thomas and John T. Kelly, each and all, neglected to perform their duty in that regard, and carelessly and negligently failed to set the brakes on said four cars, left at said point, and neglected to secure the same in any way to prevent their running north, and on account of said negligence and carelessness, the said four

freight-cars, when plaintiff was entering said switch railroad, his said engine in motion, the said four freight-cars which had been left at said point of about 200 feet south of said switch, as aforesaid, came running northerly down the main line of defendant's said railroad track, and when the same was near plaintiff's [60] said engine, the said T. M. Kline and T. J. St. Thomas, the foreman and brakeman in charge of said freight-cars, without caution or care, and having no regard for the personal safety of plaintiff, carelessly and negligently, signaled plaintiff to stop his engine, whereupon, plaintiff not knowing what was the matter, immediately set the brakes on his said engine, bringing it to a stop, and within 8 seconds thereafter, the said four freight-cars ran against and struck the tender of the engine-cab in which plaintiff was then and there sitting, with great force, and thereby violently throwing plaintiff to the deck of the engine-cab and partly out of said cab, and thereby injuring the socket of plaintiff's left hip, injuring his back and spine, destroying the sight of his left eye, breaking four of his ribs, and otherwise injuring plaintiff.

Plaintiff further says that the stopping of said engine in obedience to said signal caused said four freight-cars to strike said engine squarely and with great force, and thereby increased the violence of said collision, which materially aided in producing plaintiff's said injuries, and that plaintiff's said injuries were also caused by the insufficient number of brakemen to manage said cars, that said roadbed was defective and unsafe, that the brakes on said cars

and the coupling apparatus was out of repair and unsafe, [61] that the defendant did not inspect its roadbed and said cars, and did not furnish plaintiff a reasonably safe place in which to perform said work, and that defendant and its said servants so negligently and carelessly ran, managed and operated said freight-cars and engine, whereby said collision was caused, and plaintiff injured, as aforesaid.

Plaintiff further says that before, and at the time when said cars ran north and collided with said engine, that defendant and its said agents and servants then and there very well knew that said cars without having the brakes set thereon, and chocked, would not remain on said track, and knew that the same would run away, and knew that said railroad track was defective and unsafe, that the brakes and coupling apparatus of said cars was defective and unsafe, and knew that plaintiff, or some other employee, would be killed or seriously injured by such collision, or by the exercise of ordinary care and inspection, the defendant and its said agents and servants could have known all of the above facts.

Plaintiff further says that the defective condition of said roadbed, track, and cars, and in connection therewith that each of the aforesaid negligent and careless acts and omissions on the part of defendant and its said agents and servants was the direct and proximate cause [62] of said accident, and plaintiff's consequent injuries, for which defendant is liable, and that said injuries consisted of bruises and cuts, internal injury of his chest and lungs, injury to his back and spine, serious shock and jar, four

broken ribs, injury to his left hip, and that by reason of said bruises, said shock and jar, he has completely lost the sight of his left eye and his person disfigured.

8.

Plaintiff further says that while he was in said service of defendant, as locomotive engineer, in the exercise of due care for his own personal safety, without negligence or fault on his part, having no warning, nor notice, nor knowledge, was injured as aforesaid, and that on account of his view being obstructed by covered cars he was unable to see said four approaching cars, and on account of the noise of his engine and cars he was unable to hear the same, and could not discover that said cars were about to collide with his engine by the exercise of ordinary care, until too late to avoid said accident.

9.

Plaintiff further says that the cars he was moving and which collided with said engine were in use and had been in common and regular use upon the line of the said railroad of defendant, engaged in moving and transporting interstate commerce and traffic, and that said cars were at the time of said accident, being used in making up distribution of interstate commerce, and as a common carrier of [63] traffic over defendant's said line of railroad.

10.

That before and on the day of said accident and just prior thereto, both eyes of plaintiff were strong and healthy, and his vision was clear and distinct, and he was able to see perfectly.

That on account of said accident plaintiff has

suffered great pain and still suffers, and will suffer great pain, as the result of the injuries complained about.

That plaintiff after said injuries, placed himself under the care of a skilled oculist, and surgeon with the hope and purpose of saving his sight, if possible, and also of having his body, ribs, back and spine properly cared for and cured, but under the most careful skill and treatment the sight could not be restored to his left eye, his said broken ribs have not and will not heal, and the same press against his lungs and give him pain, and as the result of said shock and jar, he has spinal and nervous affections, and personally disfigured.

That from the date of said injuries plaintiff has been undergoing treatment for the same, and up to the present time, has been totally unfit and unable to engage in any work, and by reason of his enforced idleness for a period of the past thirteen months he has lost about \$2,450.00 in wages; and that his physical condition is such at present that it may be years before he will be able to make a living for himself, if ever.

[64] That since said accident and on account thereof, plaintiff has been obliged to be under medical treatment at the reasonable expense of \$300.00, and has been out for medical care and attention the further and reasonable sum of \$800.00, and is still at expense under the care of a physician.

That plaintiff is a locomotive engineer by trade, and at the time of his injury was 65 years of age, in good bodily health and condition, and never before

had any sickness.

That plaintiff at the time of his injury was earning, and was physically able to earn, the sum of \$175.00 for 28 days' work as a locomotive engineer, which salary defendant was paying plaintiff at the date of said injury, for his services, as said locomotive engineer.

11.

Plaintiff further represents and shows to the Court, that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as the "Federal Employer's Liability Act," which said act is now in full force and effect in the Territory (now State) of Arizona and in the Territory (now State) of New Mexico, and was at the time and place of the happening of said accident, in full force in the Territory of Arizona, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of defendant as a common carrier in the Territory (now State) of Arizona, as well as the rule of evidence governing such actions, and the measure of [65] damages, which said act, on which plaintiff relies for a recovery herein.

12.

Plaintiff further says that the defendant company, by its said acts, deeds, negligence and carelessness of its officers, agents and servants, has wrongfully deprived the plaintiff of his means of support, and that in addition to said expenditure of money for medical treatment, loss of time, loss of wages, physical and

mental pain, he has suffered damage by reason of the destruction and loss of sight of his left eye, four broken ribs, bruised hip-joint, injured back and spine, bodily disfigurement, and on account thereof, and of said injuries, to the amount of Forty Thousand (\$40,000.00) Dollars, none of which have ever been paid plaintiff.

SECOND COUNT.

SECOND CAUSE OF ACTION.

Comes now the plaintiff, and for a second cause of action against said defendant, alleges as follows:

Repeats allegations of paragraphs Nos. 1 to 6 inclusive, of the plaintiff's first cause of action, herein-before alleged.

2.

That on March 15th, 1911, while plaintiff was in defendant's employ as a locomotive engineer in defendant's said yards at said Clifton, and was in the act of entering said switch railroad with said switch engine and four of said foreign freight-cars, when four of said foreign freight-cars [66] which had been left at said point of about 200 feet south of said switch ran northerly down defendant's said track and with great force collided with the engine which plaintiff was running, and thereby violently throwing plaintiff to the deck of said engine-cab, and thereby injuring plaintiff's hip, back, spine, breaking four of his ribs, destroying the sight of his left eye, bruising and otherwise injuring him; that plaintiff's said injury was caused by the negligent manner in which defendant's employees having the then control of the

engine, cars and signals at said point conducted themselves in the management of said cars, engine and signals, and was also caused by the negligence of defendant's officers, servants and employees, and was also caused by defects in defendant's ways, works, machinery, appliances, plant, cars, engine, tracks, roadbed, and signals at said place, and by the defendant's neglect to formulate, promulgate, and enforce proper rules and regulations for the safety of plaintiff and his coemployees, in that defendant conducted its works by unsafe and dangerous methods, and did have an improper signal system, and an unsafe place for plaintiff to perform said work, and conducted its works by insufficient signals, material and men, in that defendant, charged with superintendence, control and command over plaintiff and his coemployees, negligently and carelessly conducted itself in and in connection with said [67] acts, control, and command, as a result of all of which, said four freight-cars were permitted to collide with said engine, and as a result thereof plaintiff sustained said injuries, all being caused without any negligence on the part of plaintiff in any wise contributing thereto; that plaintiff sustained said injuries while in defendant's employ, while said defendant and plaintiff were then and there engaged in interstate commerce between the different States of the United States, and that the said engine at the time of said collision was then and there carrying and transporting interstate commerce, and the employees working in connection therewith were engaged in interstate commerce, and the cars which collided

with said engine were then being employed in inter-state commerce.

That by reason of said premises, plaintiff has sustained damages in the sum of Forty-three Thousand Five Hundred and Fifty Dollars.

That plaintiff here repeats allegations of paragraphs Nos. 10, 11, and 12, inclusive, of plaintiff's first cause of action hereinbefore alleged.

WHEREFORE, plaintiff demands judgment against defendant as follows: \$2,450.00 for loss of wages; \$1,100.00 expenditure on account of said medical treatment; and said \$40,000.00 damages; the whole thereof aggregating the sum and amount of Forty-three Thousand Five Hundred and Fifty (\$43,550.00) Dollars, for which aggregate sum plaintiff demands judgment [68] against the defendant, together with the costs and disbursements of this action.

L. KEARNEY,
Attorney for the Plaintiff, Residing at Clifton,
Arizona.

[Endorsements]: (6.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark vs. The Arizona and New Mexico Railway Company, a Corporation. Second Amended Complaint. Filed April 27, 1912, at 2:00 P. M. Allan B. Jaynes, Clerk. By W. E. Boggs, Deputy. L. Kearney, Attorney for Plaintiff, Clifton, Arizona. Service by copy admitted this 25 day of April, 1912. McFarland & Hampton, Attorneys for Defendant.

*In the District Court of the United States for the
District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Motion to Make More Definite and Certain.

Comes now the defendant in the above-entitled cause and moves the Court for an order directing the plaintiff to make his first cause of action more definite and certain, in this,

[69] I.

No facts are alleged in that part of plaintiff's second complaint beginning on page 3, with the words "that portion of defendant's railroad track" and ending with the words "an injury hereinafter mentioned," showing or tending to show the grade of defendant's railway, is such that cars placed thereon would not remain on said track without being chocked or the brakes being set on said cars. Said complaint is further indefinite and uncertain in that part of plaintiff's complaint on page 6, beginning with the words "plaintiff further says," and ending on page 7 with the words "and plaintiff injured as aforesaid," for the reason that no facts or facts are alleged showing or tending to show the number of brakemen employed by defendant at the date of said alleged accident. Said complaint is

further indefinite and uncertain in that no facts are alleged showing or tending to show in what respect or in what way the brakes or coupling apparatus on the cars were defective or in what respect and in what way the brakes or coupling apparatus were out of repair and unsafe. Said complaint is further indefinite and uncertain in that no facts are alleged showing or tending to show that defendant failed to discharge its duty in the inspection of its said cars and said complaint is further indefinite and uncertain in that no facts are alleged showing or tending to show that its roadbed at the point or points set forth in said complaint was defective and unsafe and said complaint is further indefinite [70] and uncertain as no fact or facts are alleged showing or tending to show that the defendant did not furnish plaintiff with a reasonably safe place in which to perform his work and said complaint is further indefinite and uncertain, in that it fails to state any fact or facts showing or tending to show that defendant and its servants negligently or carelessly ran, managed or operated its said cars and engines at the date of said accident or at any time. Plaintiff's said complaint is further indefinite and uncertain in that portion thereof beginning on page 7 with the words "plaintiff further says that before" and ending with the words, "and servants could have known of the above facts," in the failure of plaintiff to allege any fact or facts showing or tending to show that defendant, its agents or servants had any knowledge that the cars would not remain standing without being chocked or the brakes set on said cars;

that no fact or facts are alleged showing or tending to show the grade at said points or between the points set forth in plaintiff's said complaint. Plaintiff's said complaint is further indefinite and uncertain in that part thereof beginning on page 5 with the words "plaintiff says that on or about March 15, 1911," and ending with the words "to said Shannon Copper Company Smelter," in that no fact or facts are alleged showing or tending to show by what officer, agent or servant of defendant plaintiff was ordered and directed to take said switch engine and remove [71] said cars from defendant's yards and take same over said switch railroad to said Shannon Copper Company's Smelter.

That the allegations of said complaint are so indefinite and uncertain that the precise nature of the charge is not apparent.

II.

Defendant further moves the Court for an order directing the plaintiff to make his alleged second cause of action more definite and certain; that said second alleged cause of action is indefinite and uncertain, in this, that no facts are alleged showing or tending to show any cause or reason why freight-cars left at a point about two hundred feet south of switch, ran northerly down into defendant's track, or any fact or facts alleged showing or tending to show why said cars ran in a northerly direction or any other direction on said track; that no facts are alleged in said second cause of action, showing or tending to show any cause for the injuries to plaintiff as therein particularly set forth, nor any fact

or facts alleged in said second cause of action showing or tending to show any negligence or want of care upon defendant, its agents or servants in respect to signals or no fact or facts are alleged showing or tending to show any negligence on the part of defendant's officers, servants and employees in respect to defendant's ways, works, machinery, appliances, plant, cars, engine, tracks, roadbed and signals at the alleged places or otherwise. Said second alleged cause of action is further indefinite and uncertain, [72] in this, that no fact or facts are alleged showing or tending to show that defendant failed to publish rules or promulgate the same, regulating the safety of plaintiff and his coemployees. Said second alleged cause of action is further indefinite and uncertain, in this, that no fact or facts are alleged showing or tending to show that defendant conducted its work by unsafe and dangerous methods and had an improper signal service or an unsafe place for plaintiff to perform said work. Said cause of action is further indefinite and uncertain in this that no fact or facts are alleged showing or tending to show that defendant conducted its business by insufficient signals, material and men or that defendant and its employees carelessly conducted itself in and in connection with the said acts, control and command or that said alleged negligent acts contributed in any wise to the injury complained of and further said second alleged cause of action is indefinite and uncertain in this, that no facts are alleged showing or tending to show that defendant and plaintiff were engaged in interstate commerce

between the different States of the United States at the date of the alleged accident; that the allegations of said second alleged cause of action are so indefinite and uncertain and repugnant that the precise nature of the charge is not apparent.

Attorneys for Defendant.

[73] [Endorsements]: (10.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Motion to Make More Definite and Certain. I hereby accept service of the within motion to make more definite and certain, this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912 at— M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Motion to Strike Second Amended Complaint.

Comes now the defendant in the above-entitled cause and moves the Court to strike the second

amended complaint of plaintiff from the files of the Court.

I.

Because said second amended complaint is double and does not conform to the statutes of Arizona, in this, that [74] said plaintiff has commingled and attempted to unite in his first cause of action in one count several distinct and independent causes of action, in this, an alleged cause of action against the alleged servants of defendant for leaving cars standing on track without brakes set and an alleged cause of action against defendant for failure of defendant to warn plaintiff of the approach of cars and an alleged cause of action against defendant for negligence of defendant's servants in giving signals to plaintiff to stop engine; that the giving of said signals resulted in the collision of cars with plaintiff's engine, and an alleged cause of action against defendant for failure of defendant to supply a sufficient number of brakemen and an alleged cause of action against defendant on account of constructing and maintaining defective roadbeds and an alleged cause of action against defendant by reason of defendant's failure to inspect cars and roadbed and an alleged cause of action for failure to furnish a safe place, and an alleged cause of action against defendant for the negligent management and operation of its cars and engines, and an alleged cause of action against defendant on account of defective brakes on its cars and coupling apparatus; that the same were out of repair and unsafe. Said last cause of action being in violation of the statutory duty imposed by an Act

of Congress of the United States entitled the Safety Appliance Act, approved March 2, 1893, and as amended April 1, 1896, and March 4, 1911. That separate and independent causes [76] of action based upon the alleged negligence of defendant and alleged negligence of servants of defendant under the general law and separate and independent causes of action based upon the statutory duties of defendant are commingled, set forth and alleged in one count in plaintiff's said first cause of action; that defendant can not intelligently plead nor defend said several separate and independent causes of action commingled and set forth in one count in plaintiff's said first cause of action.

II.

Defendant further moved the Court to strike said second amended complaint, because the second alleged cause of action is double and does not comply with the statutes of Arizona; because plaintiff has attempted to unite in one count in said second amended complaint, several distinct and independent causes of action. Defendant hereby refers to and adopts the facts alleged in subdivision one of this motion setting forth the several separate and independent causes of action alleged in Paragraph One of this motion as a part hereof, the several separate and independent causes alleged in plaintiff's first cause being the same separate and independent causes of action attempted to be alleged in one count in plaintiff's alleged second cause of action and further because defendant has commingled and attempted to set forth several separate causes of ac-

tion in one count in said second cause of action based upon the [77] violation of defendant's duty under the general law and several separate and independent causes of action based upon defendant's violation of his statutory duties and that defendant cannot plead or demur to said second cause of action while the same are commingled and set forth in a single count.

III.

And further, because the allegations of said second amended complaint are so indefinite and uncertain that the precise nature of the charge is not apparent.

W. C McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (11.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Motion to Strike. I hereby accept service of the within motion to strike, this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912, at — M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy.

[78] *In the District Court of the United States for
the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Motion to Strike Second Amended Complaint.

Comes now the defendant in the above-entitled cause, and moves the Court to strike from the files of this Court the second amended complaint of plaintiff.

I.

Because said second amended complaint is a proposed amendment of plaintiff's first amended complaint.

II.

Because no leave of the Court was had to file said second amended complaint.

III.

Because no special order of the Court was made authorizing or permitting plaintiff to file a second amended complaint and for the further reason that no leave was obtained from the Court and no special order of the Court was made or entered permitting plaintiff to amend [79] his first amended complaint by filing a second amended complaint.

WHEREFORE, plaintiff moves the Court to

strike said amended complaint from the files of this court.

W. C. McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (12.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Filed May 28, 1912, at — M. Allan B. Jaynes, Clerk. By Earl S. Curtis, Deputy. Motion to Strike from the Files. I hereby accept service of the within motion to strike from the files this the 24th day of May, 1912. L. Kearney, Attorney for Plaintiff.

In the District Court of the United States for the District of Arizona.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Amended Answer.

[80] Defendant for answer to plaintiff's second amended complaint demurs thereto and each of the causes of action therein alleged and for the grounds assigns the following:

I.

Because said second amended complaint nor

neither of the causes of action therein alleged states facts sufficient to constitute a cause of action.

II.

Specially demurs thereto, because said second amended complaint and each of the alleged causes of action is double and does not conform to the statute of the State of Arizona, in this, that neither of said alleged causes of action sets forth a concise statement of the cause of action attempted to be pleaded, but on the contrary in each of said alleged causes of action attempts to set forth in one count numerous, distinct, independent and repugnant breaches of duty on the part of the defendant and separate and distinct causes of action based on alleged negligence on the part of defendant's servants and separate and independent causes of action based upon alleged breaches of statutory duty.

III.

Defendant further specially demurs to that part of said second amended complaint, beginning on page 3, with the words "that that portion of defendant's railroad track" [81] and ending with the words "an injury hereinafter mentioned" because the same does not state any fact or facts showing or tending to show that the grade of defendant's railroad at the points stated is such that cars placed thereon would not remain on said track without being chocked or the brakes being set on said cars, and further specially demurring to that part of plaintiff's said complaint on page 6, thereof, beginning with the words "plaintiff further says," and ending on page 7, with the words "and plaintiff injured as

aforesaid," for the reason that no fact or facts are set forth showing or tending to show that an insufficient number of brakemen were in charge of the train at the date of the accident, that no facts are alleged showing or tending to show that the brakes or the coupling apparatus on the cars were out of repair and unsafe, nor any fact or facts are alleged showing or tending to show that defendant did not inspect its roadbed and said cars, nor any fact or facts are alleged, showing or tending to show that defendant failed to furnish plaintiff a reasonably safe place in which to perform his work; nor any fact or facts are alleged showing or tending to show, that defendant or its said agents or servants, negligently and carelessly ran, managed and operated said freight-cars and engine, and specially demurring to that part of plaintiff's complaint on page 7, beginning with the words "plaintiff further [82] says that before" and ending with the words "and servants could have known all of the above facts," because the same does not state any fact or facts showing or tending to show that defendant, its agents and servants had any knowledge that cars would not remain standing without being chocked or the brakes being set on said cars and further because no fact or facts are alleged showing that defendant, its agents or servants, knew that defendant's railway track was defective and unsafe or that the brakes and coupling apparatus were defective and unsafe.

IV.

Further specially demurring thereto because no

fact or facts are alleged in said complaint showing or tending to show that plaintiff's alleged cause of action comes within the Federal Employer's Liability Act.

V.

Defendant further specially demurs to said complaint, because no fact or facts are alleged showing or tending to show, that defendant or its employees or plaintiff were engaged in interstate commerce at the date of said accident, nor are any fact or facts alleged showing or tending to show that defendant in the operation and movement of its cars was engaged in interstate commerce on the Shannon switch at the date of the accident or any other time.

[83] VI.

Defendant for further answer to said second amended complaint denies each and every allegation therein contained.

VII.

Defendant for further answer to said second amended complaint alleges that on the 15th day of March, 1911, and for many years prior thereto, defendant published and there were in force on said date, certain rules governing the running of its trains and the switching of cars upon its main line of railway and switches and that the plaintiff in this action and in charge of the engine on the said 15th day of March, 1911, had knowledge and was familiar with said rules, the same being in full force and effect on said March 15, 1911. Said rules are in words and figures as follows, to wit:

Rule 90. "Running or flying switches must not

be made except where it would cause great delay to do the work in any other manner; and whenever they are made, the train must first be stopped, and before the engine is again started the switch and also the brakes on the cars to be set out must be tested, and great care used.

Cutting off the engine, with or without part of the cars in the train, before a train has stopped at a station, and allowing the remainder of train to follow, is forbidden. Every train must be brought to a full stop before the engine is uncoupled.

Rule 94. "On all grades, when stopping on the main line or on a siding, when cutting an engine off a train at stations to do work or at any stops of unusual length, the air must be released and a sufficient number of hand-brakes set to hold the train. Both conductors and enginemen will be held responsible for failure to comply with this rule."

That said rule No. 90 prohibited the cutting off of the [84] engine from the cars in the train before a train had been stopped and allowing the remainder of the train to follow and provided that every train must be brought to a full stop before the engine is uncoupled; that under and by virtue of said rules it was the duty of the plaintiff as engineer to see and know when his engine was cut off with or without a part of the cars that said train had been stopped; that brakes had been set and that the cars remaining would not follow; that under and by virtue of said rules and particularly Rule 94 it was the duty of plaintiff as engineer when stopping his engine on the main line or sidings or when cutting

his engine off the train at stations or at any place on the main line of defendant's line or its sidings, with or without cars, to see and know that a sufficient number of hand-brakes were set to hold the train. This rule especially set forth the duties of the engineer in respect to stopping trains to which his engine was attached, on all grades and having failed to discharge this duty as set forth in said Rule 94, at the date of the accident defendant alleges that if plaintiff was injured at the time and place set forth in said amended complaint, said injury was wholly due to the carelessness and negligence of plaintiff in his failure to discharge his duties as engineer as in said rule provided.

[85] VIII.

Defendant for further answer to said complaint alleges that any injuries sustained or suffered by plaintiff at the time or on the occasion in his amended complaint alleged, were caused in whole or were wholly contributed to by the negligence or want of care by said plaintiff, and not by any negligence or default or want of care on the part of this defendant, its agents or servants.

IX.

For further answer defendant alleges that since said accident it has been advised and believes and from the advice and belief, alleges that it had been the custom of its employees including plaintiff, prior to said accident, in switching cars from its main line up the Shannon switch to permit the cars remaining on said main line prior to being switched up said Shannon switch to remain on said main line without

brakes being set; that plaintiff knew of said custom and methods of switching said cars from the main line, up and over said Shannon switch, and having remained in the service of the company with such knowledge and acquiescence and without complaint, assumed the risk incident to such custom and methods; that defendant did not know and could not know by the exercise of ordinary care of the custom and methods aforesaid pursued by its servants including plaintiff in switching cars from its main line up and over said Shannon switch.

[86] Further answering said second amended complaint, defendant alleges that if defendant was injured while in the employ of this defendant, or suffered any damage or injury as alleged in said complaint, none of which is admitted but all of which is specifically denied, the alleged injuries, if any, were wholly and exclusively the results of risks ordinarily incident to the employment in which he was engaged at the time thereof, and which were open to his observation, and known to him, or could have been known by the use of ordinary care in the prosecution of his said work and employment, and that said risks were assumed by said plaintiff.

WHEREFORE, this defendant having fully answered, prays that plaintiff take nothing by his action, and for its costs herein expended.

W. C. McFARLAND and
JOHN R. HAMPTON,
Attorneys for Defendant.

[Endorsements]: (13.) No. 14. In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Amended Answer. I hereby accept service of the within amended answer, this the 24th day of May, 1913. L. Kearney, Attorney for Plaintiff. Filed May 28, 1912. Allan B. Jaynes, Clerk.

[87] No. 14.

THOMAS P. CLARK,

Plaintiff,

Against

THE ARIZONA AND NEW MEXICO RAIL-
ROAD COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at Twelve Thousand Six Hundred and Seventy-five 00/100 Dollars (\$12,675.00).

J. E. McCLAIN,

Foreman.

[Endorsements]: No. 14. District Court, District of Arizona. Thos. P. Clark, Plaintiff, vs. The Arizona & New Mex. Ry. Co., Defendant. Verdict. Filed Nov. 16, 1912. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy Clerk.

*In the District Court of the United States for the
District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

[88] **Judgment.**

The above-entitled cause came regularly on for trial on November 12, 1912, and concluded November 16, 1912, the plaintiff appearing by L. Kearney and W. M. Seabury, his attorney, and the defendant appearing by McFarland and Hampton, and Kibbey, Bennett & Bennett, its attorneys, and a jury having been duly and regularly empanelled to try said cause and each of the parties having adduced oral and documentary evidence, the cause having been argued to the jury by respective counsel, and the Court having duly instructed the jury and the jury having retired to consider their verdict and on the 16th day of November, 1912, having returned into court their verdict in favor of the plaintiff in the sum of Twelve Thousand Six Hundred Seventy-five Dollars (\$12,675.00), and against the defendant, which verdict was duly received and filed herein.

Now, therefore, by virtue of the law and premises aforesaid, and on motion of W. M. Seabury, attorney for plaintiff, and on the verdict of said jury so ren-

dered as aforesaid.

It is ordered, adjudged and decreed, that plaintiff Thomas P. Clark, do have and recover of and from the defendant The Arizona and New Mexico Railway Company, a corporation, the sum of Twelve Thousand Six Hundred Seventy-five [89] Dollars (\$12,675.00), with interest thereon at the rate of 6% per cent per annum from date hereof until paid; together with plaintiff's costs and disbursements taxed at the sum of \$429.27, with interest as aforesaid.

It is further ordered that execution do issue to enforce the collection of this judgment.

Dated November 16, 1912.

RICHARD E. SLOAN,
Judge.

[Endorsements]: No. 14. (27.) In the District Court of the United States for the District of Arizona. Thomas P. Clark, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Original. Judgment. Filed Nov. 18, 1912, at 10 A. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. L. Kearney, W. M. Seabury, Attorneys for Plaintiff.

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing is a true and complete judgment-roll in the case of Thomas P. Clark, Plain-

tiff, vs. Arizona & New Mexico Railroad Company, a corporation, Defendant, No. 14 in said [90] court.

Witness my hand and the seal of said court affixed this 18th day of November, A. D. 1912.

[Seal]

ALLAN B. JAYNES,

Clerk.

[Endorsements]: #14. Thos. P. Clark, Plaintiff, vs. The Arizona & New Mexico Railway Company, a Corporation, Defendant. Judgment-roll. Filed Nov. 18, 1912. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy.

[91] *In the United States District Court for the District of Arizona.*

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

Transcript of the Minute Entries.

BE IT REMEMBERED, that heretofore and upon, to wit: the twenty-second day of April, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said Court, the following order, *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Setting Case for Trial.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

It is ordered that this case be set for trial on Tuesday, June 4, 1912, at 9:30 o'clock A. M. (1-160.)

AND AFTERWARDS, and upon, to wit, the 28th day of May, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Granting Leave to File Amended Answer.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

On application of Wm. C. McFarland, Esquire, counsel for the defendant herein, the defendant is granted leave to file an amended answer herein. (1-283.)

[92] AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and

entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Directing Entry of Mr. Seabury as Counsel for Plaintiff.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

On his application, it is ordered that Wm. M. Seabury, Esquire, be entered as counsel for the plaintiff herein. (1-284.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Directing that Certain Motions be Passed on Calendar.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

By consent of counsel for the respective parties hereto, it is ordered that the several motions of the defendant herein be passed upon the calendar to be

called up on at least five days' notice to the plaintiff.
(1-284.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Vacating Order Setting Case for Trial, etc.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

It is by the Court ordered that the order heretofore made setting this case for trial on June 4, 1912, be and the same is now, vacated; and it is further ordered that this case be passed on the calendar.
(1-284.)

[93] AND AFTERWARDS, and upon, to wit, the 9th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Continuing Hearing of Motions to Strike.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

It is ordered that the hearing of the motions of the defendant to strike out portions of the complaint herein, and to make the complaint herein more definite and certain, be continued until Monday, September 16, 1912, at 10 o'clock. (1-307.)

AND AFTERWARDS, and upon, to wit, the 16th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

[Order Directing Entry of Mr. Seabury as Associate
Counsel for Plaintiff, and Submitting Motions to
Strike, etc.]

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY
COMPANY, a Corporation,

Defendant.

Upon motion of L. Kearney, Esquire, it is ordered that Wm. M. Seabury, Esquire, be entered as associate counsel for the plaintiff herein.

And now, this matter came on this day regularly to be heard upon the motion of the defendant to strike the amended complaint herein from the files, the motion to strike out portions of the amended complaint on the ground of duplicity [94] and the motion to make the amended complaint herein more definite and certain, L. Kearney, Esquire, and Wm. M. Seabury, Esquire, appearing as counsel for the plaintiff and McFarland & Hampton for the defendant. Argument of the respective counsel was had and said matters being fully submitted to the Court, the same were by the Court taken under advisement.

It is ordered that the demurrer of the defendant to the amended complaint herein be set for hearing on Tuesday, September 17, 1912, at 10:00 o'clock A. M. (1-315.)

AND AFTERWARDS, and upon, to wit, the 17th day of September, A. D. 1912, the same being one of the regular juridical days of the April, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Denying Motions to Strike, etc.; Overruling Demurrs to Amended Complaint.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

The several motions of the defendant having been heretofore argued and fully submitted to the Court and the Court being now fully advised in the premises, it is ordered that the motion to strike the amended complaint herein from the files be denied, that the motion to strike the amended complaint herein from the files on the ground of duplicity be denied, and that the motion to make the amended complaint herein more definite and certain be denied, to which ruling of the Court the defendant, through his counsel, excepts.

And now, this matter came on this day regularly to be heard upon the general and special demurrer of the defendant to the amended complaint herein, L. Kearney, Esquire, and Wm. M. Seabury, [95] Esquire, appearing as counsel for the plaintiff and W. C. McFarland, Esquire, for the defendant. Argument of the respective counsel was had and the matter being fully submitted to the Court and the Court being fully advised in the premises, it is ordered that the general demurrer to the amended

complaint herein be overruled; that the special demurrer set forth in paragraph II of the amended answer be overruled; that the special demurrer set forth in paragraph III of the amended answer be overruled; that the special demurrer set forth in paragraph V of the amended answer be overruled; that the special demurrer set forth in paragraph VI of the amended answer be overruled, to all of which rulings the defendant, through its counsel, excepts. (1-318.)

AND AFTERWARDS, and upon, to wit, the 7th day of October, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Setting Cause for Trial by Hearing.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

It is ordered that this case be set for trial by jury on Thursday, November 7, 1912, at 10:00 o'clock A. M. (1-370.)

AND AFTERWARDS, and upon, to wit, the 11th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912,

term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[96] [Order Directing Opening of Depositions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

By consent of counsel for the respective parties hereto, it is ordered that the depositions on file in the office of the Clerk be opened by said Clerk. (1-592.)

AND AFTERWARDS, and upon, to wit, the 12th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Minutes—November 12-16, 1912—Trial.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

This case came on this day regularly for trial, L. Kearney, Esquire, and Wm. M. Seabury, Esquire, appearing as counsel for the plaintiff, and W. C. McFarland, Esquire, as counsel for the defendant. Whereupon, on motion of W. C. McFarland, Esquire, it is ordered that Messrs. Kibbey & Bennett be entered as counsel for the defendant herein and both parties announce ready for trial. Whereupon, the Clerk was ordered to draw twenty names from the box wherein he had deposited in the presence of the Court the names of the jurors, summoned and not excused and the names of twenty persons were thereupon called, and all answering thereto, respectively, took their places in the jury-box. The said jurors were then duly sworn and examined on their *voir dire*. E. H. Channell was thereupon challenged and excused for cause and the Clerk then drew from the box the name of Henry Hilbers, who was duly sworn and examined on his *voir dire*. The panel being now full and complete, and said jurors in the jury-box having been passed for cause by both the prosecution and the [97] defense, the respective parties exercised their right of peremptory challenge, and the following named persons were called according to law to constitute the jury, viz.: R. H. Brooks, T. J. Smith, J. Thos. Bowles, J. B. Dills, S. C. Kleck, Kirby S. Townsend, W. J. Osborn, Smith Chittick, Jno. W. Hagerlund, J. E. McClain, Herbert L. Ritter and Henry Hilbers, who were duly sworn to well and truly try the issues joined between the plaintiff and the defendant herein. Counsel for the plaintiff then read the complaint to the jury, and

made a statement of the plaintiff's case to the jury. Counsel for the defendant then read the answer to the jury and made a statement of the defendant's case to the jury. The plaintiff then, to maintain upon his part the issues herein, introduced certain written testimony, being the depositions of J. C. Gatti, Rebecca Manes, Ross Thomas, W. A. Parker, G. L. Coffee and E. T. Martin, and also introduced certain documentary evidence, and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Wednesday, November 13, 1912, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued. (1-595.)

AND AFTERWARDS, and upon, to wit, the 13th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court, in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
ROAD COMPANY, a Corporation,

Defendant.

[98] This case having been continued from yesterday's session of this court, come now the same parties hereto, and come also the jurors herein, their

names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, introduced certain written testimony, to wit, the depositions of John Freeman, H. B. Burk, T. J. St. Thomas, and also called as witnesses the following named persons, to wit: Jeff Dunegan, C. A. Davidson, Henry Doran, G. F. Chambers, Thos. P. Clark, the plaintiff and Dr. Louis Dysart, who were duly sworn, examined and cross-examined, and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Thursday, November 14, 1912, at 9:30 o'clock A. M. to which time the further trial of this case is now ordered continued. (1-598.)

AND AFTERWARDS, and upon to wit: the 14th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
ROAD COMPANY, a Corporation.

This case having been continued from yesterday's session of this court, come now the same parties

hereto, and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, called as witnesses the following [99] named persons, to wit: Robert L. Brownfield, R. W. Craig, and Mrs. Mary Josephine Clark, who were duly sworn, examined and cross-examined and also called as a witness A. T. Thompson, former traffic manager of the defendant company, who was duly sworn and cross-examined according to law and thereupon the plaintiff rested his case. The defendant then, through its counsel moved the Court to direct the jury to return a verdict for the defendant, which motion was by the Court denied. The defendant then, to maintain upon its part the issues herein, called as witnesses R. C. Bond and E. M. Cline, who were duly sworn, examined and cross-examined and also introduced certain documentary evidence and this being the usual hour of recess, the Court duly admonished the jury according to law, and thereupon excused them until Friday, November 15, 1912, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued. (1-599.)

AND AFTERWARDS, and upon, to wit, the 15th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
ROAD COMPANY, a Corporation,

Defendant.

This case having been continued from yesterday's session of this court, come now the same parties hereto, and come also the jurors herein, their names are called and all answering [100] thereto, respectively, the further trial of the case proceeds as follows: The defendant, to further maintain upon his part the issues herein, recalled as witnesses E. M. Cline, R. C. Bond, and A. T. Thompson, who were further examined and cross-examined, and also called as witnesses the following named persons, to wit: J. T. Kelly, J. G. Lindsay, Ingraham T. Sparks, Paul Reisinger, Dr. H. H. Stark and E. Dawson, who were duly sworn, examined and cross-examined and also introduced certain written testimony, being the deposition of Dr. Henry Dietrich, and thereupon the defendant rested its case. The plaintiff then, in rebuttal, recalled as a witness Thos. P. Clark, the plaintiff, who was further examined and cross-examined, and thereupon the plaintiff rested his case. There being no further testimony offered on either side and the evidence being closed, argument of the respective counsel was had and this being the usual hour of recess, the Court duly admonished the jury according

to law and thereupon excused them until Saturday, November 16, 1912, at 9:00 o'clock A. M., to which time the further trial of this case is now ordered continued. (2-2.)

AND AFTERWARDS, and upon, to wit, the 16th day of November, A. D. 1912, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

[101] This case having been continued from yesterday's session of this court, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: Further argument of the respective counsel was had and the Court instructed the jury orally, the charge being taken down in shorthand by Jos. S. Jenckes, a phonographic reporter in attendance upon the trial. And said case being now fully submitted, said jury retire in charge of Forest W. Hill and Frank Martinez, bailiffs, officers of this court, first

duly sworn for that purpose, to consider of their verdict. (2-4.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

This cause having been continued from a previous session of the present term of this court on this day, come now the same parties hereto, and come also the jurors herein, in charge of their bailiffs, sworn for that purpose, their names are called and all answering thereto, respectively, upon being asked if they have agreed upon a verdict, through their foreman, report that they have agreed and thereupon, through their foreman, present their verdict. Whereupon said verdict was ordered recorded as follows, to wit:

“No. 14.

THOMAS P. CLARK,

Plaintiff,

against

THE ARIZONA & NEW MEXICO [102] RAIL-
ROAD COMPANY, a Corporation.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, and assess his damages at Twelve Thousand Six Hundred Seventy-five 00/100 Dollars (\$12,675).

J. E. McCLAIN, Foreman."

And the clerk, inquiring of said jurors whether such is their verdict, they say that it is, and so say they all. Whereupon it is ordered that said jury be discharged from the case. It is further ordered that judgment be entered herein in favor of the plaintiff and against the defendant in accordance with said verdict. (2-9.)

AND AFTERWARDS, and upon, to wit, the 22d day of November, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term, of said court, the following order, *inter alia*, was had and entered of record in said court, in said cause, which said order is in words and figures, as follows, to wit:

[Order Granting Ten Days to Prepare and File Bill of Exceptions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

Upon application of W. C. McFarland, Esquire, and Messrs. Kibbey & Bennett, counsel for the defendant herein, it is ordered that the said defendant be granted ten days in addition to the time allowed by rule of Court in which to prepare and file a bill of exceptions herein. (2-20.)

AND AFTERWARDS, and upon, to wit, the same day, the following other order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[103] [Order Granting Stay of Execution for Forty-two Days from November 18, 1912.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

Upon application of W. C. McFarland, Esquire, and Messrs. Kibbey & Bennett, counsel for the defendant herein, it is ordered that the defendant be granted a stay of execution for forty-two days from November 18, 1912, upon filing a bond in the sum of Five Thousand Dollars (\$5,000) within ten days from this date. (2-20.)

AND AFTERWARDS, and upon, to wit, the 28th day of December, A. D. 1912, the same being one of the regular juridical days of the October, 1912 term of said court, the following order, *inter alia*, was had

and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

[Order Fixing January 2, 1913, as Time for Settling Bill of Exceptions.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILROAD COMPANY, a Corporation,

Defendant.

It is by the Court ordered that Thursday, January 2, 1913, be and the same is hereby fixed as the time for settling the bill of exceptions in this case. (2-76.)

AND AFTERWARDS, and upon, to wit, the 2d day of January, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order *inter alia* was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[104] Be it remembered that heretofore, to wit, on the 27th day of December, 1912, the same being a regular juridical day of the October, 1912 term of the United States District Court for the District of Arizona, the defendant in the above-entitled cause, the Arizona & New Mexico Railway Company, filed in said court its petition and motion in writing for a new trial of said cause, which said motion and petition is in words and figures following, that is to say:

“In the District Court of the United States for the District of Arizona.

No. 14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Petition for a New Trial.

“Comes now the Arizona & New Mexico Railway Company, the defendant in the above-entitled cause, and prays the Court to grant it a new trial of this cause, and for grounds thereof respectfully represents:

I.

“Because the Court erred in overruling defendant’s general demurrer to plaintiff’s second amended complaint.

II.

“Because the Court erred in overruling defendant’s

ant's special demurrers to plaintiff's second amended complaint.

III.

“Because the Court erred in overruling defendant's motion to make said second amended complaint more definite and certain.

[105] IV.

“Because the Court erred in overruling defendant's motion to strike on the grounds of duplicity.

V.

“Because the Court erred in overruling defendant's objections at the beginning of the trial to the admission of any evidence in the case, on the ground that the amended complaint, and neither point therein, alleged facts sufficient to constitute a cause of action.

VI.

“Because the Court erred in denying defendant's motion made at the close of the plaintiff's evidence for a directed verdict for the defendant for the reason that the causes of action, if any, of plaintiff, as alleged in the first and second counts of his said amended complaint, are based upon the first section of the 'Employer's Liability Act,' approved April 22d, 1908, in respect to injuries received by employees while engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the time of the alleged injuries. The undisputed evidence in the cause shows that plaintiff and defendant are engaged, at the date

of the alleged action, in switching cars at its railroad yards at Clifton.

VII.

“Because the Court erred in sustaining plaintiff’s objections to and excluding the testimony of witness [106] Kelly, offered by defendant, by whom defendant proposed to show that the conduct of plaintiff on several occasions for two years previous to the date of the alleged accident was habitually and continuously negligent in observing signals given him while operating his engine in switching cars in the yards of the defendant; and the further objection of plaintiff that in many instances which occurred almost daily within two years previous to the happening of this accident, he had uniformly and habitually disobeyed signals given to him as engineer in the operating of his engine while switching in the yards of the defendant.

VIII.

“Because the Court erred in sustaining the objections of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show that the conduct of plaintiff on several occasions for two years previous to the date of the alleged accident was habitually and continuously negligent in observing signals given him while operating his engine in switching cars in the yards of the defendant; and the further objection of plaintiff that in many instances which occurred almost daily within two years previous to the happening of this accident he had uniformly and habitually disobeyed signals given to him as engineer in

the operation of his engine while switching in the yards of the defendant.

IX.

“Because the Court erred in that part of its charge in reference to the rule of the assumption of the risk in [107] limiting the assumption of risk by the employee to defects in works, or dangerous conditions, and excluding therefrom the obvious risks of dangerous operation, and excepting from the assumption of the risk the risk of danger arising in whole or in part from the negligence of any officer, agent or employee of the defendant, and because said instructions imposed the burden of proof upon the defendant that the danger, if any, was one of those which the law declares the plaintiff to have assumed.

X.

“Because the Court erred in that part of its charge in reference to the rule of damages in stating that, ‘If the plaintiff is guilty of contributory negligence and his negligence and that of the defendant company are equal, the jury will then give an award of one-half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company, then a third will be the proportion of the damages he will receive, and so on, whatever the proportion may be.’

XI.

“Because the Court erred in that part of its charge on the subject of damages, because the same is a comment upon the weight of the evidence.

XII.

“Because the Court erred in instructing the jury

that the negligence of the plaintiff, in order to exempt the defendant from liability, must have been gross, so wilful, [108] and extended to such an extent that the jury may say that it was the proximate and direct cause of the injury.

XIII.

“Because the Court erred in instructing the jury that the omission of the plaintiff to obey a signal given him to stop, by prompt obedience of which he might have stopped and averted the injury, must be wilful and intentional to exempt the defendant from liability for the alleged injury.

XIV.

“Because the Court erred in sustaining plaintiff’s objections to the testimony of Dr. Stark, a witness offered by defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of the plaintiff’s eye, about two months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at the time.

XV.

“Because the Court erred in refusing to give to the jury instructions offered by the defendant.

XVI.

“Because the Court further erred in that part of its charge wherein it instructed the jury that in order to relieve the defendant from liability on account of negligence, that the negligent conduct of the plaintiff must be wilful and wanton.

[109] XVII.

“Because the damages assessed by the jury are excessive.

XVIII.

“Because the evidence at the trial was insufficient to justify the verdict of the jury.

XIX.

“That the verdict of the jury is against the law.

XX.

“Because the Court erred in excluding the testimony of Dr. Dietrick, whose deposition was offered in evidence, for the reason that the objections urged by plaintiff on the ground that it was privileged, were waived by the plaintiff by filing cross-interrogatories to be propounded by said witness.

XXI.

“Because the Court erred in sustaining plaintiff’s objection to the testimony of the witness, J. G. Lindsay. Defendant offered to prove by said witness the mode generally adopted by prudent railway men in switching their cars under like circumstances to be the same as adopted by the defendant in this case.

McFARLAND & HAMPTON,
KIBBEY, BENNETT & BENNETT,
Attorneys for Defendant.”

**[Order Overruling and Denying Petition and Motion
for a New Trial, etc.]**

And be it further remembered that thereafter, to wit, on the 2d day of January, 1913, the same being a regular juridical day of said court, said petition and motion duly and regularly came on to be heard

by said Court, and the [110] Court being advised in the premises, then and there and thereupon overruled and denied said petition and motion for a new trial, and refused to grant the defendant a new trial of said cause, to which ruling of the Court in denying said petition and motion for a new trial the defendant then and there in open court excepted. And now the defendant, at the time of making said ruling of the Court denying said petition and motion for a new trial, reduced its bill of exceptions to writing and asks that it may be settled and signed by the Judge of said court as its bill of exceptions, which is now accordingly done in open court this 2d day of January, 1913. (2-86.)

AND AFTERWARDS, and upon, to wit, the 8th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY
COMPANY, a Corporation,

Defendant.

[Order Fixing Amount of Bond.]

This matter came on this day regularly to be heard upon the application of the defendant for an order

fixing a supersedeas bond upon a writ of error herein. W. C. McFarland and Joseph H. Kibbey, Esquires, appearing as counsel for the defendant, and this matter being fully submitted to the Court and the Court being fully advised in the premises, orders that said bond be fixed at the sum of twenty thousand dollars (\$20,000.00). (2-132.)

[111] AND AFTERWARDS, and upon, to wit, the 24th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912, term of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to wit:

14.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

[Order Allowing Writ of Error, etc.]

This matter came on this day regularly to be heard upon the petition of the defendant for a writ of error herein, Joseph H. Kibbey, Esquire, and W. C. McFarland, Esquire, appearing for the defendant and Wm. M. Seabury, Esquire, as counsel for the plaintiff. Whereupon, William M. Seabury, Esquire, counsel for the plaintiff, objected to the allowance of the petition, for the reason that the appeal was

not taken as prescribed by law, which objection was by the Court overruled, to which ruling the plaintiff, through his counsel, excepts. And now, on the consideration of said petition, the Court does allow the writ of error upon defendant giving bond according to law in the sum of Twenty Thousand Dollars (\$20,000.00), which shall operate as a supersedeas bond in accordance with the written order allowing said writ signed and filed herein. (2-144.)

AND AFTERWARDS, and upon, to wit, the 27th day of February, A. D. 1913, the same being one of the regular juridical days of the October, 1912 term of said court, the following order, *inter alia*, was had and entered of record in said [112] court in said cause, which said order is in words and figures as follows, to wit:

[Order Respecting Original Exhibits.]

14.

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILROAD
COMPANY, a Corporation,

Defendant.

It appearing to the Court that in preparing the transcript of the record on appeal it will be impracticable for the Clerk to make copies of the exhibits on file herein, the same consisting of photographs and tracings, it is ordered that the Clerk include the original exhibits in this case in the transcript of the rec-

ord and that in making a transcript of the bill of exceptions, where copies of the original exhibits are made a part of said bill of exceptions, a reference to the original exhibits on file shall be made by the Clerk in lieu of making copies of said exhibits. (2-151.)

(For Order Allowing Bill of Exceptions, see Minute Entry of January 2, 1913.)

[113] *In the District Court of the United States for the District of Arizona.*

THOMAS P. CLARK,

Plaintiff,

vs.

THE ARIZONA & NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that on the 12th day of November, A. D. 1912, at a regular and stated term of the United States District Court for the District of Arizona, the same being one of the regular judicial days of the October term of said court, 1912, begun and holden in the city of Phoenix, Arizona, before his Honor, Richard E. Sloan, District Judge, the issues joined by the pleadings in said cause came on to be tried by the said Judge and a jury empaneled and sworn to try the issues in said cause. The plaintiff was represented by L. Kearney and W. M. Seabury, his attorneys, and the defendant by W. L. Mc-

Farland, John R. Hampton, Joseph H. Kibbey and Walter Bennett, its attorneys.

To sustain the issues on his part, the plaintiff offered in evidence the deposition of one John C. Gatti, to the introduction of said deposition of said Gatti as evidence, or to the introduction of any evidence on the part of plaintiff, defendant objected for the following reasons, to wit:

[114] [Objections to Introduction of Any Evidence.]

Mr. McFARLAND.—Now, if the Court please, the defendant objects to the introduction of any evidence in this cause, for the reason that the facts stated in the first count of plaintiff's second amended complaint does not state facts sufficient to constitute a cause of action. It is not alleged in said count that the plaintiff did not know of the defective and unsafe condition of the defendant's roadbed, at or near the place of said accident and injury is alleged to have occurred, nor is it alleged in said first count that the defendant could not have known by the exercise of ordinary care of said defective and unsafe condition of said roadbed at or near the place of said accident or injury is alleged to have occurred. That no right of action arises in favor of the employee at all under the terms of the employment. The employer violates no legal duty to the employee in failing to protect him from the dangers the risk of which he agreed expressly or impliedly to assume. We desire to urge this same objection to the second count of the complaint and ask that this objection be in-

corporated in the record to the second count also, and a further objection to any evidence on the second count in the second amended complaint, for the reason that no facts are alleged showing any acts or omissions on the part of the defendant, its agents, officers or servants, that caused or proximately contributed to the injuries complained of.

Said objections by defendant to said deposition and introduction of the testimony of said Gatti were by the Court [115] overruled, to which action of the Court the defendant then and there excepted and still excepts.

And thereupon time was given to defendant as hereinafter stated within which to prepare and file this bill of exceptions.

Be it further remembered that thereupon the plaintiff introduced the following evidence in said cause, that is to say:

[Proceedings Had Tuesday, November 12, 1912.]

Tuesday, November 12th, 1912.

At nine-thirty o'clock A. M. this day, this being the time heretofore fixed by the Court for the trial of this case, comes the plaintiff in person and by his attorneys, Messrs. Kearney and Seabury, and the defendant by its attorneys, Messrs. McFarland and Kibbey & Bennett, also comes, and a jury of twelve men, being first duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein, and the complaint and answer being read to the jury by counsel, thereupon the following further proceedings are had herein, to wit:

Mr. SEABURY.—May we ask counsel for the defendants if there is going to be any denial of the corporate capacity of the defendant? The pleadings deny every allegation.

Mr. McFARLAND.—It is admitted.

Mr. SEABURY.—Does that concession also include the proof that the defendant was a common carrier on the 15th day of March, 1911, and is now?

Mr. BENNETT.—I think that is a matter of law.

[116] Mr. SEABURY.—I ask if it may be conceded as a matter of fact.

The COURT.—Is the issue specially joined as to that?

Mr. SEABURY.—I think so. They deny every allegation in the complaint.

The COURT.—I think a general denial is insufficient to put in issue the corporate capacity of the defendants.

Mr. SEABURY.—But is it sufficient to raise the issue as to how the corporation is engaged—in what business? I thought it would be safer, and it certainly would save time, to get a concession that the defendant is a corporation and was engaged as a common carrier in interstate commerce on the 15th day of March, 1911.

Mr. McFARLAND.—We have no objection to admitting that it is engaged in interstate commerce and that it is a common carrier, but whether it was engaged in interstate commerce at the time of this accident, that is a different proposition.

The COURT.—You admit, then, that it is an interstate commerce road?

Mr. McFARLAND.—Yes.

The COURT.—But you don't admit it as to this particular case.

Mr. McFARLAND.—No.

Mr. SEABURY.—But there is no dispute that it was engaged on the 15th of March, 1911, in interstate commerce?

Mr. KIBBEY.—We admit this road was at that time engaged [117] in interstate commerce, except as that may be applicable to the particular transaction.

Mr. SEABURY.—That gives us a concession of the corporate capacity, that they are a common carrier, and that on the 15th day of March, 1911, they were engaged in interstate commerce.

Mr. KIBBEY.—Except as to this particular transaction.

The COURT.—It is disputed that the plaintiff was engaged in the act of interstate commerce?

Mr. McFARLAND.—At this particular time and place. We do not concede that.

Mr. SEABURY.—I understand that. Now, if it please the Court, we desire to offer in evidence the depositions of J. C. Gatti, Mrs. Manes, Ross Thomas, W. H. Parker, Charles Davidson and G. L. Coffey, pursuant to notice dated March 8th, 1912.

Mr. KIBBEY.—I understand one of those parties is here. If he is, of course we object to his deposition.

Mr. SEABURY.—Which one?

Mr. KIBBEY.—Mr. Davidson.

Mr. SEABURY.—Very well; then we won't read his deposition. Now, we will read the deposition of J. C. Gatti.

Mr. MFARLAND.—Now, if the Court please, the defendant objects to the introduction of any evidence in this cause, for the reason that the facts stated in the first count of plaintiff's second amended complaint does not state facts sufficient to constitute a cause of action. It is not alleged in said count that the plaintiff did not know of the defective [118] and unsafe condition of defendant's roadbed, at or near the place of said accident and injury is alleged to have occurred, nor is it alleged in said first count that the defendant could not have known by the exercise of ordinary care of said defective and unsafe condition of said roadbed at or near the place of said accident or injury is alleged to have occurred. That no right of action arises in favor of the employee at all under the terms of the employment. The employer violates no legal duty to the employee in failing to protect him from the dangers the risk of which he agreed expressly or impliedly to assume. We desire to urge this same objection to the second count on the complaint and ask that this objection be incorporated in the record to the second count also, and a further objection to any evidence on the second count in the second amended complaint, for the reason that no facts are alleged showing any acts or omissions on the part of the defendant, its agents, officers or servants, that caused or proximately contributed to the injuries complained of.

The COURT.—I think these matters were dis-

cussed to some extent in the argument on the demurrer. The objections will be overruled.

Mr. KIBBEY.—What will be the rule about exceptions? The rule provides that exception is to be taken down and [119] noted at the time.

The COURT.—A stenographer is present and I think an exception may be made and noted by the stenographer whenever taken, and that will be sufficient.

Mr. McFARLAND.—Your Honor will have our exception noted to the ruling in this instance.

Mr. SEABURY.—Do I understand that the exception must be taken in accordance with the established practice?

The COURT.—Yes, indeed, I think that ought to be the practice.

Thereupon plaintiff's counsel reads to the Court and jury the depositions of J. C. Gatti, Rebecca Manes, Ross Thomas, W. H. Parker, G. L. Coffey, and at the conclusion of the reading of the deposition of Coffey, Mr. Seabury says:

Mr. SEABURY.—With your Honor's permission we would like to offer in evidence certain photographs of this track. There are two of them. I think the sooner they go in the better in order that the Court and jury may better understand the location of this accident.

Mr. KIBBEY.—When were they taken?

Mr. SEABURY.—I think in March—March 11th, 1912.

Mr. KIBBEY.—About a year after the accident?

Mr. SEABURY.—Yes.

Mr. KIBBEY.—(After examining photographs.) We have no objection to them.

[120] Mr. SEABURY.—We offer in evidence two photographs which purport to show substantially the condition of the track at the place of the injury at the time of the accident, and understand they are received without objection.

Mr. KIBBEY.—But they are not as they were at the time of the accident. They were taken a year later.

Mr. SEABURY.—I say substantially.

Mr. KIBBEY.—No objection that they are photographs of the scene of the accident as it was taken on the 12th of March, 1912.

(Thereupon the photographs in question are received in evidence and marked by the Clerk, Plaintiff's Exhibits One and Two.)

After which the deposition of E. T. Morton is read to the Court and jury by plaintiff's counsel, until conclusion, and the hour of four-thirty arriving, the Court thereupon takes a recess until nine-thirty A. M., Wednesday, November 13th, 1912, and the jury is admonished by the Court not to let anyone talk to them about the case, or to talk about it among themselves, and are permitted to separate during the recess.

Wednesday, November 13th, 1912.

At nine-thirty this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its counsel, thereupon the following further proceedings are had herein, to wit:

[121] The jurors come into court and are called by the clerk, all answering to their names.

Mr. SEABURY.—The plaintiff offers the deposition of John Freeman which appears to have been taken on the 23d of May, 1912.

Thereupon the deposition is read to the Court and jury by plaintiff's counsel, and at the conclusion plaintiff's counsel offers and reads to the Court and jury the depositions of H. B. Burk and T. J. St. Thomas.

[Recital Concerning Objections Taken to Certain Depositions, etc.]

(During the reading of the several depositions, many of the objections taken at the time of the taking of the depositions were urged and were thereupon passed upon by the Court, some of them after considerable discussion between the Court and counsel. Such objections, rulings and discussions, although taken down by the reporter at the time, have not been transcribed, defendant's counsel, who ordered the transcript, requesting that it be not done.)

[Testimony of J. F. Dunagan, for Plaintiff.]

J. F. DUNAGAN, being called as a witness on behalf of the plaintiff, and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, please?

A. Jeff Dunigan.

Q. What is your occupation?

A. Well, I haven't any at the present.

(Testimony of J. F. Dunagan.)

Q. What was your occupation in March 15th, 1911?

A. I was in the saloon business.

Q. Whereabouts? A. At Clifton, Arizona.

[122] Q. Whereabouts is your place located in Clifton?

A. It is what is known as Chase Creek.

Q. How near is that to the railroad track at Clifton?

A. Well, my place of business is about one hundred and fifty yards from the track that went up to the roundhouse—I judge about that far from the roundhouse.

Q. What part of the track would you say you were nearest to with reference to the Shannon switch?

A. Well, my place of business is not anywhere near the Shannon switch.

Q. Well, is it north or south of the Shannon switch?

A. Well, it is north—no—yes, it is north.

Q. In a southerly direction?

A. Yes, a southerly direction. There is a curve after you leave the depot that goes up Chase Creek.

Q. Tell us whether you knew Mr. Clark, the plaintiff in this action, in March, 1911.

A. Yes, sir.

Q. How long had you known him prior to that?

A. I guess ten or eleven years. I don't know exactly.

Q. You knew how he was engaged at that time?

A. Yes, sir.

Q. He was an engineer on the defendant's rail-

(Testimony of J. F. Dunagan.)

road, was he not? A. Yes, sir.

Q. Now, please tell us what you saw take place about March 15th, 1911, with reference to this collision that has been described here.

A. What do you want me to do? Just make a statement?

Q. Yes, the way you saw it.

[123] A. Well, I live on what is known as the addition—the flat—Hill Addition. They set their trains out there quite often and I steal a ride if they went up to my place of business, and I come up on this string of cars this day. I don't know the exact date—some time in March, 1911, and they stopped the train before they got to the Shannon switch, and I seen what they were going to do—cut off four cars, I think—and made the Shannon hill. I goes over to the Shannon store. They had just come back with the engine to pick up the other cut, and I thought they were going up to town with it, but they didn't; they cut loose and started for the Shannon hill again. Then I walked down between the tracks—there is a picture show there between the main line—in this direction (indicating on photograph).

Q. That would be the west side of the main track?

A. Yes, between the Shannon track and the main line. Now, I wasn't expecting anything, and when I heard the lick I seen Mr. Kline cut the cars from the ground and walk across the track to the Shannon track that goes up this Shannon hill here. That is about all I know. They hit and I ran down there.

Q. You saw the collision? A. Yes, sir.

(Testimony of J. F. Dunagan.)

Q. Do you know Kline? A. Yes, sir.

Q. Have you known him for some time?

[124] A. Ever since he came there—eight or nine years.

Q. Was he the man that cut the cars off from the engine? A. Yes, sir.

Q. Did you see him do it?

A. Not from the engine. He cut the four cars.

Q. He cut off four cars?

A. I don't know how many he cut, but he cut the cars off.

Q. He cut off certain cars that Clark's engine took to shift up Shannon hill? A. Yes, sir.

Q. He left at least four cars? A. Yes, sir.

Q. What, if anything, did you see Kline do after that?

A. I seen him cross the track—over to the Shannon track to the cars that Mr. Clark was pushing up the hill.

Q. Did you see him do anything with reference to any of the brakes on that car? A. I did not.

Q. Who else did you see on those cars, if anyone?

A. There wasn't anyone else on the cars.

Q. That is the cars left stationary?

A. No one on them at all, except me—I got off.

Q. I ask you whether or not those four cars were at a standstill when you got off of them?

A. They were stopped still.

Q. Dead still?

A. Stopped still—he had to stop still to get the slack [125] to cut the train and pull the pin.

(Testimony of J. F. Dunagan.)

Q. When you got off had the engine been removed from the car you got off of yet?

A. Well, I wasn't on the cars the engine had hold of. I was on the back end of the four cars left stationary.

Q. Didn't the engine bring those down?

A. His engine carried the cut that was cut to him and left these four standing that I got off of.

Q. Now, at the time you got off the car, Mr. Clark's engine wasn't attached to the train, was it?

A. No.

Q. It had already been cut?

A. Cut loose; yes.

Q. You say the car was stationary at the time you got off?

A. Yes, the train was stopped and the cars cut loose.

Q. Was Mr. Clark's cars going on down the main line to be switched up the Shannon switch when you got off? A. Yes, sir, going right on down.

Q. It was going down in a southerly direction?

A. No, it wasn't a southerly direction—northerly direction.

Q. Northerly, I should say. Did you see or recognize any of the men on those cars attached to Mr. Clark's engine?

A. I did after the collision—after they struck.

Q. Who did you see?

A. There were several there.

Q. Do you remember seeing St. Thomas?

(Testimony of J. F. Dunagan.)

[126] A. St. Thomas?

Q. Yes. A. I do.

Q. Do you know him? A. Yes, sir.

Q. Do you remember seeing anyone else—Mr. Kline?

A. I seen Mr. Kline, Mr. Clark, and the fireman, Mr. Chambers.

Q. Was Kelley there too?

A. I couldn't say, he could have been.

Q. He may have been for all you know?

A. Yes, there could have been several more there.

Q. Tell us, please, what you saw with reference to Mr. Clark. I understand you to say you ran up there?

A. Well, by the time I got there they had him off the engine, or he got off—I don't know how he got off. They were holding him, I think.

Q. Who was holding him, do you recollect?

A. I think Mr. Gatti was one, and maybe one of the train crew and fireman. He was complaining some—had a little blood in his face—a good deal of dirt on him—coal and stuff. I asked him if he was hurt bad. He said he didn't know how bad, he said, I am mashed up in my hip or back—complained of his hip or back. That is about all he said, and they took him on.

Q. What was his general appearance?

A. His appearance was that he was hurt—I thought [127] he was hurt bad. I thought he was killed—he was mashed all to pieces—the way the cab was in.

(Testimony of J. F. Dunagan.)

Q. What was the condition of the cab?

A. It was mashed in.

Q. Did you see any splinters in there?

A. Yes, I think it was chinking out of the car probably. I didn't pay much attention to it.

Q. When you came up there you were on the west side of the main track?

A. I crawled over to get around between the first car and his engine.

Q. You came through it?

A. Yes, came through it.

Q. That left you on the west side of the Shannon switch? A. Yes, sir.

Q. That is where you found the plaintiff after the accident? A. Yes, sir.

Q. Do you know on what side of the engine-cab Mr. Clark was sitting when he was taking these cars down the main line?

A. He was on the right side.

Q. Do you know whether the position changed when he began to move those cars back up the Shannon switch?

A. I know his position would not—In what way? Would he get on the other side of the engine?

Q. I am asking you. Did he?

A. I wouldn't think so.

Q. Do you remember what kind of a car it was that was [128] immediately next to his engine tender? A. It was a box-car.

Q. By box-car what kind of a car do you mean?

A. I mean a box-car—it could have been a stock-

(Testimony of J. F. Dunagan.)

car. It wasn't a flat car.

Q. That is what I mean. It was not a flat car—it was a top car?

A. Yes, sir, it had a top.

Q. Could you see well enough to say whether Mr. Clark from his position in the engine-cab could see these four cars approaching down the main line?

A. Well, I couldn't say. He couldn't see them the length of his string of cars. If he was on a line he might have seen them after his cars took Shannon switch and got within a car length—he might have seen them—but he couldn't see them pushing four cars until they cleared into Shannon switch.

Q. Now, if his entire cars, including the engine, had cleared into Shannon switch, he would not have been hit? A. No, sir.

Q. So, isn't it a fact he didn't get clear of Shannon switch at the time of the accident?

A. It certainly is a fact that he didn't get clear.

Q. So you don't think he could see the approaching cars?

[129] Mr. KIBBEY.—It seems to us that this is all very leading.

The COURT.—Yes, it is. I sustain the objection.
(By Mr. SEABURY.)

Q. Do you know, as a matter of fact, Mr. Dunagan, whether Kline did set the brakes on those remaining cars, or did not set them?

A. That I couldn't say.

Q. Couldn't you say whether you know or not

(Testimony of J. F. Dunagan.)

whether he did so?

A. Well, he could have set them before I got on the train so far as that is concerned.

Q. He could? A. He could have done so.

Q. But he didn't do it afterwards?

A. Not while I was riding on it.

Q. Do you know whether he blocked the cars with sticks or stones? A. No, I don't.

Q. You saw him cross the track?

A. I saw him leave the car when he cut the train.

Q. Without doing any of those acts?

A. Yes. He could have set the brakes before he got up there so far as I know.

Q. You know as a matter of fact, too, that if those brakes had been set the cars could not have rolled?

Mr. KIBBEY.—We object to the question.

The COURT.—Yes, I think he has not shown his competency [130] in that respect.

(By Mr. SEABURY.)

Q. Have you ever been engaged in railroad work?

A. Some; yes, sir.

Q. When and for how long?

A. I worked for the A. & N. M. people when the road was a narrow gauge, and I switched a while for the S. P. Company and made a few trips braking. Something near a year I was with the Southern Pacific people.

Q. As brakeman? A. Yes, sir, and switchman.

Q. For about a year? A. Pretty near a year.

Mr. SEABURY.—Now, we ask the same question, if your Honor please.

(Testimony of J. F. Dunagan.)

Mr. McFARLAND.—I think he is not qualified.

The COURT.—I think he has shown experience. He may answer the question.

(Thereupon the reporter reads the following question:—)

Q. You know as a matter of fact, too, that if those brakes had been set the cars could not have rolled?

Mr. KIBBEY.—We object further to the question on the ground that it is leading and suggestive.

Mr. SEABURY.—I will change the form in order to avoid the objection.

(To the witness.)

Q. Mr. Dunagan, do you know from your experience as a [131] railroad man whether or not these particular cars would or could have moved if the brakes on them had been set by Kline?

A. Why, no, they would not have moved, if the brakes had been set. Certainly not.

Mr. SEABURY.—That is all.

(By Mr. KIBBEY.)

Q. Where did you get on the train?

A. I got on at the flat.

Q. On the other side of the river?

A. On the south side of the bridge.

Q. And the cars stopped across the bridge?

A. After they crossed. I don't think all the train crossed—it might have. Any way, I got off when they made the first cut.

Q. Then you went to the Shannon store?

A. The Shannon store is fifty or sixty feet from the track, I guess.

(Testimony of J. F. Dunagan.)

Mr. KIBBEY.—That is all.

The COURT.—We will take a recess until half-past one o'clock. The jury will bear in mind not to speak about the case to anyone or to let anyone talk to you about it. (Thereupon the Court takes a recess.)

At one-thirty P. M., the parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, the jurors come into court and are called by the Clerk, all answering, and thereupon the following [132] further proceedings are had herein, to wit:

[Testimony of C. A. Davidson, for Plaintiff.]

C. A. DAVIDSON, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Mr. Davidson?

A. C. A. Davidson.

Q. What is your business, Mr. Davidson?

A. Clerk now in a grocery—butcher business.

Q. What was your occupation in March, 1911?

A. Butcher—meat clerk.

Q. Whereabouts?

A. In Mr. Gaddi's shop at Clifton.

Q. How near is Mr. Gaddi's shop to the railroad track at Clifton?

A. Twelve feet—something like that—from the track.

(Testimony of C. A. Davidson.)

Q. About twelve feet? A. Yes, sir.

Q. Is that the railroad track that is the main line a few hundred feet south of the Shannon switch?

A. Yes, sir.

Q. Which side of the track is Mr. Gaddi's shop—the east or west side of the track—do you remember?

A. It is the east side.

[133] Q. Now, please tell us what you saw take place on the 15th day of March, 1911, at that place.

A. Well, I am in the habit of stepping out there and watching the switching crew making the hill there. They often back their loaded cars up in front of the shop and break the crossing—the road crossing—just below the butcher shop. I have been in the habit of standing out in front there watching them do this switching and making the hill with those loaded cars. Oftentimes they don't make the hill. Well, this morning I was out there. There were eight cars, I think, standing in front of the shop and they backed down—brought them down across the road crossing and stopped and uncoupled four and started off towards town. And immediately after they started off, the four that they had left there followed slowly, and to make sure that they were following I looked at the wheels and could see the bright part of the wheel moving. They went past the switch—the engine and the other four cars—and around the bluff, and I thought to myself, they will make it back before these four cars that was making after them would catch them at the switch. So they came around pretty fast, and right opposite

(Testimony of C. A. Davidson.)

the cars—the brakeman was sitting on the loaded cars going up the hill—and he made a motion and at that the train slacked up at once, and it wasn't long before I could see the front car of these four that followed them swing. So just as they were going to hit I hollered to Mr. Gatti and two or three others in the shop [134] to come out and watch the cars—they were going into a collision, I thought. Just as they came out the cars had done hit, and just about that time the whistle began to whistle like, and Mr. Gaddi ran down. I couldn't see anybody was hurt or anything of that kind. That is about all I saw of that part of it.

Q. Was there anybody in charge of the cars that began to roll by themselves? A. No, sir.

Q. Did you see anybody there at all with them?

A. Nobody there after that—after the engine and the other four cars left.

Q. Did you see the engine and the four cars attached to it cut off from the cars that subsequently followed? A. I did.

Q. Who, if you know, cut off the cars?

A. The brakeman, Mr. Kline.

Q. What was his name?

A. Max Kline, they called him.

Q. Did you notice what, if anything, he did after cutting the cars?

A. He jumped on the tail end of the car they were hauling, with his feet on the grease-box or axle-box, and hung on to the handles they have on the cars to climb up on, and rode as far as the switch.

(Testimony of C. A. Davidson.)

Q. Did he climb up on the cars, do you recollect?

A. No, not then. He did when they were coming by. I [135] kept watching then. He had no more gotten up there and was sitting there than he noticed these four cars coming down.

Q. When was it you saw him make the motion?

A. He must have been right opposite these other four that were following then.

Q. You couldn't say about how close these cars that were following were to the car on which Kline was sitting at the time he made the motion?

A. It couldn't have been very far—pretty close.

Q. What kind of a motion did he make, do you recollect?

A. Pretty quick. I was kind of anxious myself.

Q. Did he put his hands down?

A. I know he put one down quick, and I think he kind of hung on to the brake to get up, and I quit watching him.

Q. Do you remember which side of the car Kline was climbing up on?

A. I didn't see him climb up that car.

Q. You didn't see him climb up?

A. No.

Q. You saw him jump on the grease-box of the wheel?

A. When he rode to the switch he did.

Q. That is what I mean.

A. That is what I saw him do.

Q. Which side of the car?

A. The right-hand side going.

(Testimony of C. A. Davidson.)

Q. In the same direction the car was going?

A. Yes.

[136] Q. The same side the switch was on. That would be the west side, wouldn't it?

A. No, it must be the east.

Q. I show you Plaintiff's Exhibit One, and ask you to indicate on it which side Kline jumped on the car when it was in motion.

A. He jumped on here (indicating) and rode as far as the switch here—the car coming this way.

Q. So when he cut off the cars and boarded the cars attached to the engine, what side of the track would you say he was then on?

A. Well, he jumped across over here. I seen him several times do it. But I couldn't say I seen him get on this train at all after he got off the switch.

Q. I mean immediately after the cars were cut—separated one from the other. You testified, as I recollect, that he stepped on the grease-box of the car attached to the engine? A. Yes, sir.

Q. And hung there for a while?

A. Yes, sir, as far as the switch.

Q. Now, which side of the car was he on?

A. On the right-hand side.

Q. The right-hand side as you were going? That would be the easterly side? A. Yes, sir.

[137] Q. Do you know who the engineer on that train was on that occasion? A. Yes, sir.

Q. Who? A. Mr. Clark.

Q. The plaintiff in this action? A. Yes, sir.

(Testimony of C. A. Davidson.)

Q. Did you go up to where the cars collided one with another? A. No, sir.

Q. What did you do after you shouted to Mr. Gatti and the others to come out?

A. I stood then and watched how things came out—I could not leave the shop.

Q. You didn't leave the shop? A. No, sir.

Q. Did you see anything else after that?

A. Mr. Clark was going home.

Q. Did you see him when he was going home?

A. Yes, sir.

Q. Do you recollect who, if anyone, was helping him?

A. Mr. Gatti was with Mr. Clark at that time.

Q. Did you notice Kline all the time from the time he got off the car up to the time you saw him make the motion you described?

[138] A. No. I noticed him— He climbed up on the end of this car going up the hill.

Q. Which car is that—the one attached to the engine or the others?

A. The head car attached to the engine. He had no more than got seated there than he noticed these loose cars coming down towards him—the four of them. With that he made a motion and he got up on the car at the same time.

Q. After he cut off the cars he didn't go back to the cars that were stationary? A. No, sir.

Q. At the time he cut off the cars were the ones which followed the engine in motion or standing still? A. Well, they followed—

(Testimony of C. A. Davidson.)

Q. What? At the time of the cut off?

A. They looked like they were standing still, but right after they left those cars I thought they were moving, and to be sure of my thought about it I seen the wheels—you could see the bright wheel moving.

Q. At the time Kline was hanging on to the other car going down to the engine?

A. Yes, sir, he didn't seem to notice they were following at all—didn't know it.

Q. Do you know what kind of car it was that came immediately after the tender on Mr. Clark's engine?

A. No, I couldn't say that.

Q. Do you recollect whether it was a flat or a top car?

[139] A. A coke-car—stock-car they use for handling cattle.

Q. What kind of cars are they?

A. They are all loosely boarded.

Q. High boards? Not flat? A. No.

Q. Do you know on what side of the engine Mr. Clark was sitting?

A. He was sitting on the right-hand side of the engine facing town.

Q. Do you know whether Mr. Clark could have seen the other cars approaching? A. No, sir.

Q. Could he have seen them?

A. I don't think so.

Q. In your judgment, how long was it after you saw Kline give this signal? A. Right at once.

Q. You mean the collision occurred—

(Testimony of C. A. Davidson.)

A. No, the train stopped—it slacked up.

Q. About how long after you saw him give that signal did the collision occur?

A. Hardly any time afterwards.

Q. Hardly any time?

A. Right prompt after he gave the motion, or whatever he done—I don't know exactly—that motion.

Q. About how many seconds would you say, in your judgment?

[140] A. A second or two, I imagine—things looked pretty quick.

(By Mr. McFARLAND.)

Q. A second or two?

A. I thought so—pretty quick work.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. KIBBEY.)

Q. How far is your shop from this point of collision, Mr. Davidson?

A. Oh, it is between—something like four hundred and fifty and five hundred feet.

Q. In what direction—up or down the track—say north or south?

A. What we call up town—it is north.

Q. Your shop is north of the switch?

A. Our shop is south.

Q. Of the switch? A. Yes, sir.

Q. Towards the bridge? A. Yes, sir.

Q. Now, you say Kline rode this car up from the point where he cut it off to the switch?

(Testimony of C. A. Davidson.)

A. Yes, sir.

Q. On over that switch?

A. I think Mr. Kline did.

Q. And he was riding on the grease-box?

A. Yes, sir. Had his feet on there and had hold of [141] the rounds.

Q. Did you see him get off to throw the switch?

A. Well, I couldn't say for certain now, of course, but I am pretty certain I did.

Q. You don't know, then, whether he threw the switch or not?

A. Well, I wouldn't be positive about that. Pretty certain I seen him get off there, and I think he threw the switch.

Q. On which side of the track is the switch-stand?

A. The right-hand side going up.

Q. It would be, then, on the same side you were?

A. Yes, sir.

Q. Was there anything to obstruct your view of the switch-stand? A. Not a thing.

Q. How far beyond the switch did the car run which he was riding?

A. Well, as a rule, according to the train they have—whether they go way around the bluff—

Q. No, on that particular day, I mean. How far did they go that day?

A. Well, I couldn't say now.

Q. You say you can't say?

A. I wouldn't say positive about that.

[142] Q. Where was the car at the last moment you saw Kline hanging on to the grease-box?

(Testimony of C. A. Davidson.)

A. At the switch—off the switch this way.

Q. He got off the cars on your side of the track?

A. Yes, sir.

Q. At the switch? A. Yes, sir.

Q. Where did you next see Kline?

A. On top of the car that Mr. Clark was backing up the hill.

Q. He was on which car of the four?

A. The first car going up the hill.

Q. Then he was not on the car next to the engine?

A. No, sir.

Q. Was anybody on the car next to the engine?

A. I didn't see anybody.

Q. You were looking at the cars, were you not?

A. That is about all the cars you can see, the first car, when they are going up, on account of the bend and the curve, the engine and the cars ahead are out of your view.

Q. You could see the cars before the collision?

A. Yes, sir, I could see that car; it is further than the others.

Q. Could you see the cars at the point of collision?

[143] A. I could see the loose cars—the first car.

Q. The which car?

A. The first car of the four that ran down of themselves.

Q. That were on the main line? A. Yes, sir.

Q. Then you couldn't actually see the point of collision—that was on the opposite side of the cars to you? A. Yes, sir.

(Testimony of C. A. Davidson.)

Q. But you could have seen if there had been a man on that car right next to it on the Shannon switch? A. No, I couldn't have seen him.

Q. Why not?

A. Those four cars that went down by themselves were in the way. I could have seen them if I had run on the other side of the road.

Q. If he was on top of the car and the cars were of equal height?

A. To make the Shannon hill after they pass the switch, the Shannon hill road is much higher.

Q. You didn't see anybody on the front car, the car next to the engine at any time? A. No, sir.

Q. Now, immediately upon the impact of the two — What was the speed of the cars going up the Shannon switch?

A. I don't know. They generally go up pretty fast.

Q. At that particular time?

A. The same as usual.

[144] Q. Did those cars stop there before the collision? A. No, sir.

Q. At what rate of speed do you think they were going at the moment of the collision?

A. I don't know much about that, but I know they were going pretty fast. That is, the train the engine was on were making the hill pretty fast.

Q. Now, immediately after the collision what became of the cars on the Shannon switch and of the engine?

A. Well, it stopped right away afterward.

(Testimony of C. A. Davidson.)

Q. How long afterward?

A. No time to amount to anything.

Q. Two or three seconds? A. I guess.

Q. How far had it gone past the point of collision?

A. From where I was standing it didn't look very far.

Q. It did pass, however, didn't it?

A. I couldn't tell you that; I wasn't right there.

Q. Couldn't you see whether the engine had entirely passed the four cars?

A. No, I couldn't see the engine, only the top of it.

Q. If the engine or any part of it had been north of the string of cars on the main track, you could have seen the engine?

A. No, not at that time.

Q. Why not?

[145] A. Because those four cars obstructed the view.

Q. You don't know whether the four cars and the engine on the Shannon switch went by the point of collision after the collision?

A. I know that the train that the engine was on, after it struck, stopped right afterwards and then it ran back a ways. That is when the whistle began to whiz.

Q. How far past that point—did it instantly stop at the point of collision?

A. At that time it was pretty hard for me to tell.

Q. Did you notice it went by and then came back, and of the second collision?

A. I knew it came back.

(Testimony of C. A. Davidson.)

Q. And there was a second collision?

A. I think so, because then I could see the forward car off the track, it looked like to me.

Q. When did that forward car get off the track?

A. I think at the second collision.

Q. What caused the second collision?

A. When the engine ran back.

Q. Then the train did pass the point of collision, didn't it?

A. That I don't know. I wasn't right there, at no time. I never went down to the train at all. Stayed right where I was.

Q. Now, in what direction were you from this—how far was your shop from the track?

[146] A. About ten or twelve feet—something like that.

Q. And four hundred and fifty feet from the point of collision? A. Something like that.

Q. Where were the cars on the main track when you first saw them moving? Directly opposite you?

A. The four loose cars?

Q. Yes.

A. No, they were below the road crossing, and the road crossing was below me.

Q. What do you mean by below? A. North.

Q. Where is your store with reference to the Shannon store? A. South of the Shannon.

Q. On the same side of the track? A. Yes, sir.

Q. How far away from you was the cut made in the cars?

(Testimony of C. A. Davidson.)

A. Well, I should imagine about halfway between me and the switch.

Q. About halfway between you and the switch?

A. Yes, sir, something like that. Maybe more than halfway.

Q. Those cars were left there where that cut was made? A. They were supposed to be left there.

Q. You saw them?

[147] A. I thought they seemed to follow up right away as soon as they left them.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of Henry Doran, for Plaintiff.]

HENRY DORAN, called as a witness in behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Mr. Doran?

A. Henry Doran.

Q. Mr. Doran, what is your business?

A. Locomotive engineer.

Q. By whom are you employed?

A. The A. & N. M. Railway.

Q. The defendant in this suit? A. Yes, sir.

Q. How long have you been in their employ, Mr. Doran? A. A little over four years.

Q. Continuously? A. Yes, sir.

Q. Without a break? A. Yes, sir.

Q. At that is the last four years?

(Testimony of Henry Doran.)

A. I went to work the 21st day of December, 1907.

Q. Have you been with them ever since?

A. Yes, sir.

[148] Q. Had you ever been in the railroad business before that? A. Yes, sir.

Q. How many years? A. Since 1892.

Q. Have you been engaged in railroading ever since? A. Yes, sir.

Q. In what other capacities, if any, besides railroad engineer? A. Locomotive fireman.

Q. Do you know Mr. Thomas P. Clark, plaintiff in this case? A. Yes, sir.

Q. How long have you known him?

A. Since my arrival in Clifton. I got acquainted with him when I came to Clifton.

Q. That was in 1907? A. 1907, yes, sir.

Q. Do you remember the collision that occurred when Mr. Clark was injured, near the Shannon switch in March, 1911?

A. Yes, sir. I remember the circumstance.

Q. Where were you at the time the collision occurred?

A. I was working around there somewhere. I wasn't present.

Q. You didn't see it? A. No, sir.

Q. How soon after that did you come on the scene?

[149] A. I didn't see them until they brought the crippled engine to the roundhouse, is the first I seen of it.

Q. What was the condition of the engine, particularly on its right side?

(Testimony of Henry Doran.)

A. Well, I noticed the air-pipes broken and the air-drum knocked loose and the cab damaged some.

Q. What was the condition of the tender?

A. I noticed the tender was damaged some—the grab-irons knocked off the side is all I noticed about the tender—scratched a little.

Q. Did you notice any splinters or rubbish around the cab?

A. There was a little when it came to the round-house, but they had possibly been removed before they brought it there.

Q. Do you know who the train crew was on that particular engine at that time?

A. I don't know who all were there present, but I know the men working at the time. I couldn't say who were working with the engine at the time, for I wasn't there. Very often there are changes made in the crews on different days.

Q. Who was the yardmaster in that yard on March 15, 1911? A. Mr. Kelley, I believe.

Q. Kelley was? A. Yes, sir.

[150] Q. Tell us briefly what his duties were.

A. The duties of yardmaster?

Q. Yes.

A. The duties of yardmaster is to direct the handling of cars and trains within yard limits. He has charge of the switchmen and engine foreman and of the switching engine, and he shifts the cars about to different places wherever business desires.

Q. Does the engineer of the switch engine take any instructions from him at all?

(Testimony of Henry Doran.)

A. Yes, sir, he is under the yardmaster's instructions.

Q. Who was section foreman there?

A. I don't remember. You mean who is there at present?

Q. No, on that occasion. Not section foreman, but who was the foreman?

A. I don't remember who was acting foreman at the time.

Q. You don't recall?

A. No. Sometimes it is changed—the foreman might be laid off and someone acting in his place. I don't remember who was acting engine foreman at the time.

Q. How long had Kelley been the yardmaster in that yard?

A. I don't know how long he had been working for the company. He was there when I went there.

Q. Had he always been yardmaster from the time you went there? [151] A. Yes, sir.

Q. That was back in 1907? A. Yes, sir.

Q. Do you know what, if any, position Kline occupied with reference to this train and switch engine? A. At that time?

Q. Yes.

A. No, right at the time of the accident I don't remember. I knew he was working in the yard, but didn't know what position he was in on that particular day.

Q. Do you happen to know who the fireman was on the engine?

(Testimony of Henry Doran.)

A. Mr. Jack Chambers was the fireman.

Q. Had you had any talks with Mr. Kelley, the yardmaster, in regard to the moving of cars that didn't have brakes set on them?

A. Some time before that I did.

Q. About when was it?

A. During the months of May and June, 1910, I was on the switch engine sometime during those two months.

Q. What did you say to Mr. Kelley at that time?

Mr. KIBBEY.—We object. How could a conversation between two employees of the road be competent?

The COURT.—Mr. Kelley was the foreman?

Mr. SEABURY.—He was the yardmaster.

[152] Mr. KIBBEY.—And here was a conversation between them.

The COURT.—How do you think that bears?

Mr. SEABURY.—I think that bears very materially. What we intend to show is that Kelley, the yardmaster, as the witness has testified, was charged with the duty of directing the movement of those cars. We intend to show that Kelley had knowledge of the fact that cars left in this particular position without having the brakes set were liable to move, and that complaint was made to him in regard to it. And we wish to show what Kelley said with reference to it.

The COURT.—Is that, do you think, admissible to show negligence on the part of the company directly?

Mr. SEABURY.—We think it is admissible to

(Testimony of Henry Doran.)

show that the plaintiff had the right to rely upon the fact that his brakemen were going to set those brakes. That it bears upon the question as to whether the company had notice, through its yardmaster, of the fact that those cars were liable to move. By this witness we wish to prove that he was told that they would move and that they were dangerous. If the yardmaster charged with the moving of those freight-cars in that yard knew they were liable to move, either because he had seen them or was told they were going to move, certainly we think it would clearly show he should have given directions to have the cars braked.

The COURT.—You think it required care—the exercise of care—on his part?

[153] Mr. SEABURY.—Yes, your Honor, and your Honor will recall that we may base our recovery on the negligence of any fellow-servant of this company, abrogating, of course, the old rule. So we claim the negligence of Kelley the yardmaster if shown by his refusal to act for the protection of plaintiff's welfare would constitute negligence.

The COURT.—I presume if they rely on the negligence of Kelley as a fellow-servant, they would have to show all the elements of negligence—knowledge—or such facts as ought to impute knowledge to him, of the necessity for some degree of care.

Mr. KIBBEY.—We don't object to their showing notice to the defendant, but we object to their getting at it in this way.

Mr. SEABURY.—I will withdraw the question.

(Testimony of Henry Doran.)

(To the Witness.)

Q. Mr. Doran, had you ever seen cars on the main line of this track immediately south of the Shannon switch move of their own volition or power?

A. Yes, sir.

Q. About how often had you seen that occurrence?

A. Twice during the time I was on the switch engine during the two months I mentioned—May and June.

Q. About where would you say those cars were located [154] when you saw them?

A. Between the switch and the crossing.

Q. About how many cars were on the main track that moved at that particular time?

A. I don't remember the exact number. At one time the whole string moved ahead and at one time there was just one left that ran out on the frog and ran out when I went up the hill. At one time they moved ahead before we started up the hill. I don't remember how many cars were in the string.

Q. Do you recollect that it was more than four on that occasion?

A. I couldn't say more than four—I don't remember how many.

Q. But you have seen one car left there move of its own volition?

A. One car alone moved out on the switch. There were others standing back of it on the main line. That is, after I went up the hill and came back.

Q. Now, do you know whether the yardmaster Kelley was ever present?

(Testimony of Henry Doran.)

A. He was present when the one car rolled out. He was the man that flagged me when I came down the hill.

Q. Do you know whether or not the brakes were set on that car? A. I do not.

[155] Q. If the brakes had been set would the car have moved?

A. I shouldn't think it would; the grade isn't very steep.

Q. Not steep enough to allow a car with brakes set on it to move?

Mr. KIBBEY.—We object to the question. It is leading and assuming facts and all sorts of things.

The COURT.—I sustain the objection.

(By Mr. SEABURY.)

Q. Now, Mr. Doran, did you ever talk with Mr. Kelley about cars moving by themselves at that point? A. Yes, sir.

Mr. KIBBEY.—We object. He has testified Mr. Kelley was there and saw them.

The COURT.—Yes, I think so. Do you want to show the admission of Kelley?

Mr. SEABURY.—We want to show by this witness that he discussed the movement of these cars by their own volition as it were with Kelley, and that he made a request of Kelley, as the yardmaster charged with the control of those things, to see to it that they should not roll thereafter, and I wish to show Kelley's response.

Mr. KIBBEY.—Kelley could not bind the defendant by any response he might make.

(Testimony of Henry Doran.)

The COURT.—He could bind the defendant in this respect: if his carelessness—if the defendant is bound by his negligence, then you may charge the facts to him from which [156] negligence may be inferred as a matter of law—knowledge of the situation there and the degree of care which that situation called for.

Mr. KIBBEY.—We have no objection to that, but we do have objection to any discussion between this witness and Kelley.

The COURT.—How would you prove knowledge of the situation there? His own declarations might prove that, might they not?

Mr. KIBBEY.—His own declarations could not possibly prove negligence.

The COURT.—Not his declarations, but his knowledge.

Mr. KIBBEY.—If this witness had said, "Kelley, that is dangerous," I don't know as we would have any objection to it, but we do object to a discussion of the matter between these employees.

The COURT.—Suppose the statement instead of coming from the witness had come from Kelley himself—assuming Kelley said the place was dangerous?

Mr. KIBBEY.—That is an attempt to prove knowledge by the agent's declaration. You can prove it by the agent himself. You can't prove it by the declaration of the agent to a third person.

The COURT.—It would indicate that his attention had been called to it. I think it is admissible. If you may prove [157] his knowledge in any way

(Testimony of Henry Doran.)

I think you may prove it by his own declarations.

Mr. KIBBEY.—We object to it that the defendant is not bound in any way by the declaration.

The COURT.—The defendant may not be bound by it, but—

Mr. KIBBEY.—If the defendant isn't bound by it, it is immaterial.

The COURT.—I overrule the objection.

Mr. KIBBEY.—We except.

(By Mr. SEABURY.)

Q. Tell us what talk you had about this particular matter.

A. I don't remember the exact words we had, but that was the second time when one car rolled, it was the second time they rolled on me, and I said to him—I spoke to him about setting the brakes on those cars and he said he would not.

Q. He said he would not?

A. That is the substance of what he said.

Q. You told him the cars were moving that way.

A. Yes, sir; I asked him why he didn't set the brakes on those cars and he said he would not. That is when they rolled the second time on me.

Q. Did you ever speak to him again about it?

A. Not that I remember.

Q. Do you know whether anyone else spoke to him about it? A. No, sir, I do not.

Q. Did you see Mr. Clark after he was hurt?

[158] A. Not right directly afterwards. I did a few days after.

Q. On any of those times you say the cars rolled

(Testimony of Henry Doran.)

without any motive power, was Kline present?

Mr. KIBBEY.—He has not said he saw the cars roll or saw them roll without motive power. He said he saw them out on the frog.

Mr. SEABURY.—I certainly understood him to say that on two occasions he saw cars moving without any motive power except their own.

Mr. KIBBEY.—I didn't understand that he used the word "motive power" at all.

Mr. SEABURY.—I don't think he used the word "motive power"—

Mr. KIBBEY.—Then we object to his saying—

The COURT.—At the time he saw these cars move as he testified. You may call his attention to the incident about which he testified.

(By Mr. SEABURY.)

Q. Do you know what it was that made these cars move on these two occasions you have specified?

A. They rolled out of their own accord, I suppose. There was nothing around to cause them to roll. They were left setting there. One time they rolled of their own accord and I pulled ahead and the cars followed and I had to push them back before I went up the hill. The second time I went up with a cut of cars and came back and one car had rolled out and blocked us, and Kelley was there and flagged us when I came back. I don't know what caused it to roll out unless it rolled of its own accord.

[159] Q. At the time you saw the cars move was there any engine attached to the other end of the car, or any other motive power? A. No, sir.

(Testimony of Henry Doran.)

Q. Now, I ask you whether on either of those occasions Kline was present?

A. I don't remember whether he was or not.

Q. Do you know whether Kline had ever seen cars move in that position of their own accord?

A. No, sir, I do not.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. KIBBEY.)

Q. If the train is not entirely stopped moving forward and the cars are uncoupled the cars will naturally follow the engine?

A. If not entirely stopped?

Q. Yes.

A. Very likely they would.

Q. Sometimes it does happen that a coupling is broken or uncoupled when the cars are really in motion?

A. I don't understand.

Q. I say it does sometimes happen that the uncoupling is made when the cars are really in motion?

A. Not at that place.

Q. That is never done?

A. They always stop the cars still before they go up [160] the hill, because if they didn't they couldn't pass the cars, they would follow you on down to the switch.

Q. It does sometimes happen, though, that the pin is pulled when the cars are still in motion?

A. Around yards and different places?

Q. Yes.

(Testimony of Henry Doran.)

A. That very often happens in switching at different places.

Mr. SEABURY.—We object to around yards and different places. The inquiry should be addressed to this particular place.

The COURT.—The answer is in, it may stand.

(By Mr. KIBBEY.)

Q. When was it you had this talk with Kelley, and Kelley said he didn't intend to put the brakes on?

A. During the time I was in the switch engine.

Q. How long ago? A. May and June, 1910.

Q. Longer ago than that? A. What?

Q. That is the first time you spoke to him about it?

A. The first and only time.

Q. About what time in 1910 was that?

A. May and June—I don't remember the exact time, but I was on the switch engine during those two months.

Q. After that were you on the switch engine at all?

A. I have been on it at different times for a day or [161] two or a few days.

Q. You were on the engine after that?

A. Yes, sir, after that time. From that time up to the present time I have been on the switch engine at different times.

Q. With reference to the time you say you knew those cars rolled. A. Sir?

Q. Upon which occasion was it you say those cars rolled that you had this talk with Kelley?

A. The second time.

Q. Was that time the time you found the single

(Testimony of Henry Doran.)

car on the frog? A. Yes, sir.

Q. You didn't see that car roll down there, I understand?

A. No, sir, the car was there when I came back.

Q. It wasn't there when you left?

A. If it hadn't been in the clear I couldn't have passed it.

Q. Was that all that was said between you and Kelley on that subject? A. At that time?

Q. Yes. A. That is all I remember of; yes, sir.

Q. Did you report that to anybody—that conversation? A. Sir?

[162] Did you report that conversation to anyone? A. Report it to anyone?

Q. Yes. A. No, sir, I made no report of it.

Q. Were there any other superior officers of the road located at Clifton at that time?

A. I suppose there was; yes, sir. The general offices are at Clifton.

Q. And you made no report to any of those officers? A. No, sir. I made no report.

Q. Of Kelley's refusal to direct the brakes to be set on those cars when left on that track?

A. No, I made no report.

Q. Why not?

A. Because it had been the custom to do the business that way, and I supposed he knew what he was doing.

Q. You say it has always been the custom to do the business that way?

(Testimony of Henry Doran.)

A. While I was on the engine; yes, sir.

Mr. KIBBEY.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

Q. You were asked the question whether cars could be uncoupled and still be in motion at that place. I ask you whether in March—

Mr. KIBBEY.—I didn't quite ask that question. In fact, you objected because I didn't confine it.

Mr. SEABURY.—If you have any objection to make, I wish you would make it.

[163] Mr. KIBBEY.—We object.

The COURT.—What is the objection?

Mr. KIBBEY.—He is assuming I asked a question that I didn't ask.

Mr. SEABURY.—I will withdraw it and put it in another way.

(To the Witness.)

Q. Mr. Doran, do you know whether in March, 1911, there was any substantial grade between the company's store and the Shannon switch?

A. I wouldn't call it a substantial grade.

Q. Was there any grade?

A. Grade enough for the cars to roll. I don't know what per cent.

Q. But there was enough grade to allow a car to roll? A. Yes, sir.

Q. Now, in order to uncouple a train of cars was it not necessary to bring the whole train to a stop on that place?

(Testimony of Henry Doran.)

Mr. KIBBEY.—We object to the question as leading and suggestive.

The COURT.—It is leading.

(By Mr. SEABURY.)

Q. Well, I ask you, could a car be uncoupled there without bringing it to a full stop?

A. It could be done; yes, sir.

Q. How could it be done?

A. Very easily. A car is very often uncoupled on the run [164] in making a flying-switch and so forth.

Q. Now, you have heard the testimony in this case as to how this accident occurred? A. Yes, sir.

Q. Would you say this was any case of a flying-switch?

Mr. KIBBEY.—We object to the question.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

(To the Witness.)

Q. If cars were to be uncoupled there while in motion, will you tell us how you do it?

A. Uncoupled while in motion? That is easily done. Give the switchman the slack of the pin and he can uncouple them, and then move away from them. Don't have to come to a stop. He can raise the coupler rod and release it from the other cars any time you give him slack on the train.

Q. If that method of uncoupling cars is not used, what would you say then as to whether it was necessary to bring the cars to a full stop before uncoupling them? A. How is that?

(Testimony of Henry Doran.)

Q. I say, if that method of uncoupling cars is not used, how else could you uncouple them?

A. There are different ways of uncoupling them. That is the present method of uncoupling cars. Cars have all uniform couplers.

Q. What I mean is, would the car have to come to a stop [165] to uncouple in any other way except by a flying-switch?

A. It wouldn't be necessary to stop the cars if you don't want to. You can uncouple cars in motion at any time if you so desire.

Q. And the grade would not affect the question?

A. No, the grade would not affect it if they were prepared to handle them. That depends on what the trainmen want to do with them.

Q. Do you know how the cars at this particular place were uncoupled in March, 1911?

A. No, sir, I don't know. I wasn't present at the time.

Recross-examination.

(By Mr. KIBBEY.)

Q. The pin can always be pulled if there is a slack between the couplings?

A. The pin can be pulled if they give you slack on the train.

Q. No matter how fast the train is running—fifty or a hundred miles an hour—if there happens to be slack there you can lift the pin.

A. Yes, sir, you can do it.

Mr. KIBBEY.—That is all.

(Witness excused.)

[Testimony of G. F. Chambers, for Plaintiff.]

G. F. CHAMBERS, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

[166] Q. What is your name?

A. G. F. Chambers. Known as Jack Chambers, which you have already heard me called, I suppose.

Q. Mr. Chambers, what is your business?

A. Locomotive fireman.

Q. How long have you been engaged in that occupation?

A. The best I can remember seven years last August.

Q. With what concern, if any, are you now employed?

A. With the Arizona and New Mexico Railroad.

Q. That is the defendant in this suit?

A. Yes, sir.

Q. How were you employed in March, 1911?

A. As fireman—locomotive fireman.

Q. For the defendant? A. Yes, sir.

Q. Were you the fireman on Mr. Clark's engine involved in this collision? A. Yes, sir.

Q. Now, will you please tell us what took place on the 15th of March, 1911, with reference to this collision that has been described?

A. Well, we were working Shannon hill, and we had twelve cars, the best I remember, and in order to clear Shannon crossing as we have heard so much

(Testimony of G. F. Chambers.)

about, we shoved eight cars over the crossing and left them stand on the main line, and went up the hill with four. On coming back we [167] coupled into the eight and pulled them up just to clear the Shannon switch and brought them to a stop, cut off four cars on the main line and proceeded to go up the hill again the second time. And after running over the switch, as we backed up the cars ran down the main line and cornered our engine.

Q. That is the last four cars that were left standing on the main line?

A. Yes, sir, the four cars we left standing on the main line.

Q. What part of it did they strike?

A. The engine-cab and just enough of the tender to get the grab-iron on the tender.

Q. What kind of car was it that was immediately next to the tender and attached to the tender?

A. I don't just recall. It was what we call a high one—either a box or stock-car.

Q. When did you first observe these cars in motion, if at all?

A. Couldn't tell that they were in motion at all at any time until after the first collision.

Q. Please tell us what your position was in the engine-cab and what Mr. Clark's position in the engine-cab was immediately prior to the collision.

A. Well, he was sitting on his side of the cab on his seat-box in the usual position to perform the duties of an engineer.

(Testimony of G. F. Chambers.)

Q. Which side?

[168] A. The right-hand side, always—and I on the left-hand side. I don't just remember whether I was looking through the side window or the back window—I don't just remember.

Q. What took place just before the collision occurred? A. When we got a back-up signal—

Q. From whom did you get the back-up signal?

A. I don't just remember—probably from either one of the switchmen. It was probably St. Thomas. He was on the car next to the engine sitting on top. Just before we came to a stop I put in a fire and at that time probably Mr. Clark got the signal while I was putting in this fire, to back up. They threw the switch and gave a back-up signal and we started rolling ahead. I don't just remember now who got the signal—whether it was he or I. Might have been from either one of the switchmen. Oftentimes the man that throws the switch will step over and give the back-up on my side.

Q. Who were the switchmen?

A. In this case Mr. St. Thomas and Mr. Kline.

Q. Did you get a stop signal from anyone after you began to back up Shannon hill? A. Yes, sir.

Q. From whom? A. Kline.

Q. Where was he at that time?

A. On the fourth car from the engine, what we call the head car we were shoving.

Q. On which side of the car was he with reference to the Shannon track, do you know? Would the

(Testimony of G. F. Chambers.)

picture help you?

[169] (Handing photograph to witness.)

A. I don't need that. Very near the center—just aside from the running-board—would be called the west side—is the best I remember—with his feet hanging down over the end or side of the car. I can't tell positive, but I think that is the position he was sitting in.

Q. What kind of a signal did he give you?

A. What we call a washout signal—stop.

Q. What does that kind of a signal mean?

A. Stop.

Q. What did you do with it?

A. Delivered it to Mr. Clark both verbally and with my hands.

Q. What took place then?

A. He stopped as soon as possible. He applied the air in the emergency.

Q. How soon after that signal before the collision came, do you recall?

A. I would say not over three seconds—four at the outside. Only a matter of going about three car-lengths. Of course I couldn't see that at the time we got the signal, but I would say not over three or four seconds from the time we got the signal until they hit the first time.

Q. From your position in the cab could you not see the cars with which you collided?

A. I could see them at the time we started to back up. [170] Probably while we were going a car and half, and then I would see them no more until we

(Testimony of G. F. Chambers.)

got far enough by for the end of the first car to come in view—me looking across the tank.

Q. How close would they be to your engine at the latter time?

A. I could probably see the car a car-length and a half maybe. Possibly see the crossing of the grade a car-length and a half from where I was sitting before we would hit them—not any further than that anyway, as the car we were coupled into was a high one and it of course obstructed the view of them other cars.

Q. Do you know when if at all Mr. Clark could see the approaching cars immediately prior to the collision?

A. Well, he could have seen them a little further away than I could, but it is only a guess about how far. He might see them, oh, possibly two cars or two cars and half maybe.

Q. Just before the collision occurred, the car that was nearest to your engine tender was going around that little curve in Shannon switch, wasn't it?

A. Yes, we were on that curve.

Q. What, if any, tendency would that have on the car immediately attached to your tender in obstructing the view or making it clear for the plaintiff to see the approaching car?

A. I don't know whether I quite get what you mean. Is it your meaning that on this curve would he be able to see the car more plain or not so plain?

[171] Q. That is what I want you to tell us. I want to know which from you.

(Testimony of G. F. Chambers.)

A. As soon as the car hit the curve he could see the approaching cars more plain than he could before.

Q. That would depend, would it not, on how far up the Shannon switch you had gone?

A. Well, there is nowhere between there and the next curve on the Shannon track but what he could see just as plain—until you get to the next curve.

Q. Now, do you know whether or not the car immediately attached to the tender obstructed the plaintiff's view?

A. Yes, it did. Not just at the time of the collision, but before that, previous to that, he couldn't see at all for the cars that we were pushing.

Q. Did you know why you had been given a stop signal?

A. No, I supposed we were killing a man. We killed two there and I supposed were getting another.

Q. Do you know whether Mr. Clark knew what was the occasion of the stop signal?

A. No, he had no way of knowing.

Q. He had none? A. No.

Q. But you say he obeyed the signal, as I understand? A. Yes, sir.

Q. What took place immediately after the collision, Mr. Chambers?

A. Well, as soon as they collided we ran on up the hill. There is a pretty heavy grade there and there was nothing to [172] hold us after the collision, as our main reservoir had been knocked off and we had no brakes. We ran a sufficient distance for the grade to stop us and they started back down.

(Testimony of G. F. Chambers.)

Just as soon as they hit I turned around to see Mr. Clark—to see what I could do for him. I thought he had some of those boards run through him, was the first thing I thought of. Just about the time they come to a stop he hollered to me to get up and stop them. Of course he knew we would roll down and collide again. So he pulled himself out of the gangway some way. I was still on the engine trying to stop them from colliding the second time, and they ran down and hit again, and I got on to the ground until they collided the second time, and just after that I got back on and finished the job of stopping them.

Q. Could you see Mr. Clark on the ground near the track?

A. Not until after I had stopped the engine and done a few little jobs that had to be done immediately after the smash-up.

Q. Which side of the engine was he on—when you saw him on the ground, I mean—which side of the track? A. On the west side.

Q. Is there anything else that you recall taking place then? A. No, I believe not.

Q. Did you notice Mr. Clark's condition at that time?

A. No, I didn't—not particular. I noticed he was hurt, but couldn't tell how bad. They took him home before I could [173] get away from the engine.

Q. You didn't see who took him? A. No.

Q. When the stop signal was given, could you see

(Testimony of G. F. Chambers.)

the approaching cars, or could Mr. Clark?

A. No, neither of us could.

Q. Do you know whether Mr. Kelley was there at the time of the collision? A. No, I don't.

Q. You don't know whether he was there or not, Mr. Chambers? A. No, I do not.

Q. Mr. Kline was there, though, wasn't he?

A. Yes.

Q. And St. Thomas? A. Yes.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. How far were the cars pulled up from the bridge before they were stopped? How far were the twelve cars when they were first stopped?

A. Well, now, I don't know just what you mean there. I don't remember where we got those twelve cars from to start with—which yard it was in—whether we brought them down from the yard immediately in front of the depot or whether we got them from the flat. But we placed eight cars—

Q. Then the cars were there when you went down with the [174] switch engine—in front of the Shannon store—when you went down with the switch engine.

A. After going up the hill the first time?

Q. No, in the first instance.

A. No, they were not left standing on the main line.

Q. Did you pull them up in front of the Shannon store?

(Testimony of G. F. Chambers.)

A. We pulled eight of them up there in order to cut four off to make the second trip.

Q. Did you pull the twelve up there?

A. That is what I am telling you. I don't remember where we got them—whether in the upper yard. If in the upper yard we push them, and if in the lower yard we would pull them.

Q. You don't remember whether you got them from the flat? A. I don't remember that.

Q. Now, where were the remaining eight cars left after you cut off the first four?

A. The best I remember we shoved them over the Shannon road crossing. That would leave the nearest car to the Shannon switch right in front of Gatti's butcher-shop somewhere. Just to clear the road crossing was our aim, and that would leave some of them standing on the river bridge.

Q. Now, you cut off four of the twelve?

A. Yes, sir.

Q. Where were the remaining eight cars left after you cut off the first four cars on that track?

A. Well, I just finished telling you. Sitting on the main line in front of Gatti's butcher-shop.

[175] Q. How far would that be from the Shannon switch?

A. Well, in the neighborhood of four hundred feet—just a guess.

Q. Now, you cut the four cars off and pulled them beyond the Shannon switch and then pushed them up the Shannon track? A. Yes.

Q. Now, how far is it from the Shannon switch

(Testimony of G. F. Chambers.)

down there up to the Shannon smelter?

A. Oh, I don't know. I should judge about five-eighths of a mile—possibly three-quarters, at just a guess.

Q. Now, when you returned after having taken the first four cars up, did you find the eight there at the same place where they were left?

A. I would judge so. If they moved at all it was not enough for us on the engine to notice it.

Q. They were standing still when you came back?

A. Yes, sir, standing still when we coupled into them.

Q. What did you do with those eight cars that were standing there?

A. Coupled in to them and pulled up on the main line and cut off four on the main line just to clear the Shannon switch.

Q. How far would that leave the eight cars remaining south of the Shannon switch?

A. There were not eight remaining then—we cut off four of them.

[176] Q. After you cut off four of the eight, where did you leave the four that remained on the main line?

A. We left them just to clear the Shannon switch.

Q. How far would that be from the Shannon switch south?

A. Well, in order to clear they would have to stand away from the switch about one hundred feet.

Q. A hundred feet?

A. Something like that. I don't just know what

(Testimony of G. F. Chambers.)

the curve is there.

Q. Then the four cars you left there would be about one hundred feet south of Shannon switch?

A. Something like that. Possibly not quite so far. That would depend on the curve of the Shannon track leaving the main line. I don't know just how far it would be.

Q. Now, when you pulled the second four cars off the main line, shoving them up on the Shannon switch, how far had you gone before you got this stop signal?

A. I would say a car and a half on a guess. After we had started to back up we had probably gone a distance of a car and a half, maybe two cars—we had developed a speed, I suppose, of six miles an hour.

Q. You were going six miles an hour?

A. That is the best of my judgment.

Q. Then you got this signal two car-lengths before you got to the frog? A. No, I can't say that.

[177] Q. How far was the engine from the frog when you got the signal? A. Well, I don't know.

Q. Well, approximately. Was it an inch from it?

A. How is that?

Q. Was it as much as a foot?

A. Yes. When we got the signal our distance from the frog must have been—

Q. The distance of your engine?

A. Three or four cars. That is, our position on the engine must have been, I judge, three or four cars.

Q. That would be about one hundred and sixty

(Testimony of G. F. Chambers.)

feet, wouldn't it, assuming forty feet to the car?

A. Yes, if you wish to call it forty feet.

Q. Now, one hundred and fifty feet, approximately, from the frog when you got the signal, at what distance, going six miles an hour, could the engineer have stopped that train? A. I don't know.

Q. Could he have stopped it in the length of the engine and tender? A. No.

Q. In two car-lengths? A. No.

Q. In three? A. No, sir.

[178] Q. Could he stop it in four?

A. No, sir.

Q. Could he stop it in five? A. Possibly so.

Q. In five? A. Possibly so.

Q. Did he apply the air as soon as he got the signal? A. Yes, sir.

Q. Reverse the engine? A. No.

Q. That is the direct air.

A. Yes, sir, it is all the braking power you can get.

Q. What kind of an engine was it?

A. Commonly called a goat—a switching engine.

Q. What is the tonnage of it?

A. About seventy-five tons—possibly eighty.

Q. Now, with straight air on a train going six miles an hour that train could not be stopped in five car-lengths from the time you got the signal? Not less than five car-lengths?

A. You say it could not be stopped?

Q. Yes.

A. Well, we couldn't stop them, anyway. I say they could not be stopped.

(Testimony of G. F. Chambers.)

Q. That would be one hundred and sixty feet?

A. Yes.

[179] Q. Upgrade, too, wasn't it?

A. Not to amount to anything.

Q. There is a slight upgrade?

A. A slight upgrade; yes, sir.

Q. Now, that is what you say, that engine and those four cars going six miles an hour could not be stopped with the application of direct air inside of one hundred and fifty feet—with straight air.

A. That is my opinion.

Q. He did put the air on? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. When you got the signal? A. Yes, sir.

Q. And you gave him the signal? A. Yes, sir.

Q. Not only verbally but by motion?

A. Yes, sir.

Q. And that was five car-lengths from the switch?

A. I didn't say that—not five car-lengths from the switch.

Q. How far did you say?

A. When I got the signal?

Q. Yes.

[180] A. You asked me how far from the frog when I got the signal, and I told you for a guess I would say four car-lengths, but you didn't ask me how far from the switch at any time.

Q. How far was it from the point at which you got the signal to the point of collision—approximately?

A. About three cars, I should guess.

Q. Didn't you say a while ago approximately about

(Testimony of G. F. Chambers.)

five? A. No.

Q. How far is the frog from the point of collision—isn't it still further south?

A. I don't know, I never stopped to think about that. I don't know just how they would shape up if you put them there together.

Q. Did your cars collide north or south of the frog?

A. I would say just about at the frog. To guess at it, it might be a few feet south, possibly.

Q. Then if they collided a few feet south of the frog, it would be a greater distance from where you got the signal to the point of collision than it would be at the frog?

A. Yes, sir, providing it was south of the frog.

Q. You mean to say that you don't know where the collision occurred?

A. I mean to say that I don't know whether it was on the frog or whether it was south of the frog—I couldn't hardly say that. It was all done in an instant. It is only [181] a guess about the point where they collided.

Q. You say he didn't reverse his engine—simply put on the direct air when he got the signal?

A. He applied the straight air in emergency.

Q. You got an emergency signal?

A. Yes, sir, what we call a washout signal.

Q. What was the condition of the throttle when you first saw it after the collision?

A. The steam was shut off—the throttle was closed.

Q. Where was the lever?

A. Which lever do you have reference to?

(Testimony of G. F. Chambers.)

Q. The reverse lever.

A. The best I remember—hooked up four notches from the center in the back motion.

Q. You say those four cars were stopped when you took the second load off the main line—the remaining four cars that were stationary?

A. When we cut off from them?

Q. Yes.

A. Yes, they were stopped dead still.

Q. Dead still? A. Yes, sir.

Q. You say that Kline and St. Thomas were the brakemen?

A. Kline and St. Thomas were the ones present.

Q. Where do I understand you to say Kline was when you were backing the cars up the hill?

A. He was sitting on the fourth car from the engine.

[182] Q. In other words, he would be four cars from the engineer—Kline would?

A. Four cars and the length of the tender.

Q. Now, where was St. Thomas?

A. He was on the first car from the engine—the one we were coupled to—sitting on the end next to the engine on the engineer's side facing the east with his feet hanging off the side of the car—facing the east and sitting just next to the ladder where you climb up the corner of the car.

Q. On the west side?

A. No, on the east side on the engineer's side.

Q. Where was Kline now—four cars ahead?

A. Yes.

(Testimony of G. F. Chambers.)

Q. What was his position at that time?

A. I just finished—

Q. Standing up or sitting down?

A. I just finished telling you that he was sitting on the end of the car with his feet hanging down the side of the car.

Q. Kline or St. Thomas?

A. Kline, I just told you about—four cars from the engine sitting on the car with his feet hanging off.

Q. And St. Thomas?

A. On the car next to the engine.

Q. Both sitting down, one on the last car and the other on the first car? A. Yes, sir.

Q. With their feet hanging down on the same side of the car?

[183] A. No; Kline was facing the way we were going, with his feet hanging down over the end of the car, and St. Thomas was facing the east with his feet hanging over the side of the car.

Q. Then Kline's back would be to you?

A. Yes, that is my recollection of it.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

Q. Mr. Chambers; do you know what railroads those cars you moved belonged to?

A. Possibly not all of them. The majority of them were C. & S.—Colorado and Southern—and Atchison, Topeka and Santa Fe. I would say probably about evenly divided.

(Testimony of G. F. Chambers.)

Q. Were there any other cars at that point at that time?

A. No, other than the twelve we were handling—taking up the hill.

Q. Those are described as foreign cars, are they not? A. Yes.

Q. How were they loaded, do you know?

A. The majority were coke. Whether there were any others in them or not I don't just remember, but the majority of them were coke. Might have been some merchandise—might have been some stock-cars loaded with coal.

[184] Q. Did the cars have anything on them to indicate where they came from?

A. No, nothing to indicate where they came from.

Q. Do you know where those cars came from?

A. No.

Q. Now, as I understood you, you said the rate of speed at which you were backing up Shannon hill was about six miles an hour?

A. Yes. It might have been a little more. It wasn't any less—we were going that fast anyway.

Q. What rate of speed is usually used going up Shannon hill with loaded cars?

A. On making the run for the hill there, we usually aim to get right up to the yard limit, which is six miles an hour. We don't aim to exceed it.

Q. In your judgment is that rate of speed required to go up there with those loaded cars or not?

A. It is.

Q. Tell us whether in your opinion, if this stop

(Testimony of G. F. Chambers.)

signal you have spoken about was not given would this collision have occurred.

A. I hardly think it would.

Mr. SEABURY.—I think that is all.

(Witness excused.)

[**Testimony of Thomas P. Clark, in His Own Behalf.**]

THOMAS P. CLARK, the plaintiff, called as a witness in his own behalf and duly sworn, testifies as follows:

[185] Direct Examination.

(By Mr. SEABURY.)

Q. What is your name? A. Thomas P. Clark.

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. How old are you, Mr. Clark?

A. I am sixty-six.

Q. Were you in the employ of the defendant railroad company in March, 1911? A. Yes, sir.

Q. In what capacity?

A. Engineer of a switch engine.

Q. Whereabouts? A. In Clifton yards.

Q. What were your duties at that time and place?

A. Moving cars around under the direction of the yardmaster.

Q. Who was the yardmaster?

A. John T. Kelley.

Q. Do you remember moving any cars on the 15th day of March, 1911? A. Yes, sir.

Q. Do you know what railroads those cars belonged to?

(Testimony of Thomas P. Clark.)

A. The Colorado and Southern—C. & S. as they are abbreviated.

Q. And any other railroad?

[186] A. I don't know any other cars.

Q. They were marked C. & S.? A. Yes, sir.

Q. That is the mark of the Colorado & Southern?

A. Colorado and Southern; yes, sir.

Q. What did you do with the cars that day?

A. What did we do with them?

Q. Yes.

A. Placed part of them on the Shannon smelter and the other ones we didn't get up there with.

Q. How many cars were there in that string of cars you were engaged in moving on that day?

A. There were twelve altogether.

Q. Now, please tell us what you did with those twelve cars.

A. We pushed twelve cars below—we picked them up on Hill's flat—the south yard—cut off eight cars south of the Shannon crossing as they call it—a road crossing—and kept four attached to the engine and went up from the Shannon switch and pushed them four cars up to the Shannon smelter, and we came back over the Shannon switch and backed down and took hold of the eight cars south of the Shannon crossing and pulled them all up so they would clear the Shannon crossing—pulled them north again—cut off four [187] on the main line north of the Shannon crossing between the Shannon crossing and the Shannon switch—and we pulled up over the switch and was starting for the Shannon switch when

(Testimony of Thomas P. Clark.)

those four cars got up and run into us and we didn't move them any more that day—I didn't.

Q. At the time that you cut off the last four cars that you took away from the main line, were the remaining cars stationary or not?

A. They were not in this case.

Mr. BENNETT.—What was the answer?

The WITNESS.—No, sir.

(By Mr. SEABURY.)

Q. I don't think you understand the question. What I want to know is, whether the cars you left on the main line on the last trip were stationary at the time you left them or not.

A. Oh, yes, they were stopped.

Q. Were they in motion at all at the time your engine left them? A. No, sir.

Q. What kind of a car was it you had attached to your tender, do you remember, on that last trip?

A. What they call a stock-car or a rack-car.

Q. Describe it.

A. It is for the shipment of stock—a top car, or covered car.

Q. When you were backing up the Shannon switch did you get a signal from anyone?

[188] A. From the fireman.

Q. Who was that?

A. Jack Chambers, we call him.

Q. What was the signal you got from him?

A. Stop at once.

Q. What did you do then?

A. Stopped as soon as I could.

(Testimony of Thomas P. Clark.)

Q. What did you do in order to make the stop?

A. Applied the air with full force.

Q. Applied the air with full force? A. Yes, sir.

Q. About how long after you got the signal from Mr. Chambers did the collision occur?

A. About three seconds, probably.

Q. That was all?

A. It might have been a little bit more, but not much—say three or four.

Q. When, if at all, did you first see the cars that collided with the cars attached to your engine?

A. It was immediately back of the tender and coming up almost end for end flush with the cars that was behind the tender—they didn't quite clear.

Q. Didn't quite clear the engine?

A. Didn't clear the engine at all—the cars didn't quite clear each other—the roofs of the cars.

Q. Now, about how long was it before the actual collision [189] that you saw the approaching cars for the first time? A. About two or three seconds.

Q. How long? A. About two or three seconds.

Q. What did you next recall after that collision?

A. Well, there was the collision, of course. The timbers of the cars came into the cab and knocked me out and down on to the deck.

Q. What did you do, if anything, then?

A. I couldn't do anything then, only get off the engine.

Q. Did you say anything to Jack Chambers who was in the cab with you?

A. Yes, he was in amongst the timber in the cab,

(Testimony of Thomas P. Clark.)

and I could see from my position lying on the deck that it was a dangerous place, and I told him to get out of there. I couldn't get up to help him out.

Q. Did you try? A. Yes, sir.

Q. What do you next remember?

A. The next I remember I got out of the way. I was useless—helpless—partly off the engine, and I slid on off and got on the ground and lay down.

Q. Which side of the engine—which side of the track—did you land on?

A. The west side—the left side.

Q. The west side? [190] A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Who was the crew on that train that day?

A. We were short-handed a little bit. J. M. Kline was the foreman and St. Thomas was the brakeman—two.

Q. Just two? A. Yes.

Q. Who was the foreman? A. J. M. Kline.

Q. Who was the yardmaster at that time?

A. John T. Kelley.

Q. Did you ever speak with Kline or St. Thomas in regard to putting brakes on the cars that remained on the main line?

A. Yes, sir. I can't say that I said it to St. Thomas or Kline, but the yardmen there. When they ran ahead on me once before I said they should set the brakes, and they said they would.

Q. Those were the men that were engaged in operating those cars in that yard, were they not?

A. Yes, sir.

(Testimony of Thomas P. Clark.)

Mr. BENNETT.—That is leading and suggestive, and we ask to have the answer stricken out.

The COURT.—It would be leading, except that there has been so much testimony on that subject that I assume it is—

[191] Mr. SEABURY.—I will withdraw it, your Honor. I have no desire to lead the witness.

The COURT.—The answer may stand as it is.

(By Mr. SEABURY.)

Q. Mr. Clark, what railroad was it that used that Shannon switch?

A. The Arizona and New Mexico.

Q. Was there any other railroad that used it?

A. The Coronado used it down by there—what you call the Coronado railroad, once in a while.

Q. From the switch to the smelter, I mean. Does anyone else use that part of the road except the Arizona and New Mexico railroad?

A. The Shannon engine comes down there occasionally—the Shannon-Arizona railroad.

Q. I mean on the day of this accident.

A. Not that I know of; no.

Q. Now, Mr. Clark, please tell us what happened to you after you lay down on the ground. Who came to you first?

A. I think Mr. Gatti—no—let me see—Kline, I think. Next Kelley—John Kelley came.

Q. Who was it that took you home?

A. Gatti helped me to my gate and Kline also.

Q. How far was your gate from the place where you were found next to the track?

(Testimony of Thomas P. Clark.)

[192] A. About one hundred yards.

Q. Now, please tell us what your condition was so far as you know, immediately after the accident.

A. I know I was in great pain and all that—couldn't walk. I was pretty badly hurt. I endeavored to get up and couldn't do it. Mr. Gatti, I think it was—I think possibly Mr. Kline helped me to my feet and helped me down to my gate.

Q. Now, where did you feel pain at that time?

A. My back and hip was the worst.

Q. Was that the chief place?

A. The condition of my back and hip was what stopped me from getting up. Of course I was hurt other places, too.

Q. Now, what was the condition of your eye at that time? A. It was good up to that time.

Q. I mean immediately after the accident.

A. It was bruised up a little.

Q. Was there any blood on your face at all?

A. That is what they told me after I got home. I couldn't see myself.

Q. Have you any distinct recollection one way or the other as to that?

A. About the condition of my eye?

Q. Yes.

A. It closed up shortly after, and a day or two after I got it open and it was pretty near gone, and in two or three [193] days it was gone entirely.

Q. Which eye was it? A. The left eye.

Q. Do you recollect whether any blood came from your eye at all immediately after the accident?

(Testimony of Thomas P. Clark.)

Mr. KIBBEY.—We object to that as leading.

The WITNESS.—No.

The COURT.—That is leading.

The WITNESS.—Only what I was told.

(By Mr. SEABURY.)

Q. I only want your recollection. You say Gatti and Kline helped you part of the way home?

A. Yes, sir.

Q. Did they help you into the house?

A. No, I refused to let them go into the house. I thought I could get in myself and my wife came out and helped me.

Q. How far was it you walked yourself?

A. Not far. Only from the gate to the steps.

Q. What took place as soon as you got into the house? What did you do?

A. They took charge of me there—my wife did.

Q. Your wife took charge of you? A. Yes.

Q. What did you do—did you remain standing?

A. I laid down on the bed as soon as I got in.

[194] Q. You sat down on the bed?

A. On the cot.

Q. Did you undress and go to bed? A. No.

Q. What did you do?

A. Well, my wife got to work bathing—washing me off first. I don't think I took my clothes off until the doctor came.

Q. When did the doctor come?

A. He was there within an hour.

Q. Who was it? A. Dr. Dietrich.

Q. Who else came to attend you? A. Doctors?

(Testimony of Thomas P. Clark.)

Q. Yes. A. None.

Q. Did you have a nurse attend you?

A. Yes, sir.

Q. Who was it? A. Mrs. Manes.

Q. Rebecca Manes? A. Rebecca Manes.

Q. How long was she with you?

A. I think about eight days.

Q. During that time did you continue to suffer much pain? A. Always.

Q. Whereabouts?

[195] A. My chest, my rib, my hip, back of my head and eye.

Q. How long did any of these pains continue?

A. A month.

Q. Which of them continued for a month?

A. Some of them continues until to-day.

Q. Which of them continue until to-day?

A. This one (indicating chest), my ribs and my hip.

Q. Do you continue to have any pain in your eye?

A. Not very much. It is logy and bad and gummy in the morning, but the pain isn't very bad.

Q. Can you see anything out of that eye if you cover the other eye? A. No, sir.

Q. You can't see anything at all?

A. Not a thing.

Q. Did the eye continue to pain you continuously from the time of the accident?

Mr. BENNETT.—That is leading.

The COURT.—Yes.

Mr. BENNETT.—It simply amounts to counsel

(Testimony of Thomas P. Clark.)
testifying and the witness acquiescing.

The COURT.—The Court has ruled.
(By Mr. SEABURY.)

Q. Please tell us how long your eye continued to pain you.

A. For over a month it pained bad, and occasionally ever since.

[196] Q. How long were you confined to the house after the accident, do you recall?

A. I think about four weeks—three and a half weeks, say. I am not sure.

Q. How long were you under medical treatment?

A. For a month.

Q. How long had you been in the employ of the defendant company prior to the accident?

A. About thirteen years.

Q. During that time what, if any, illnesses had you had? A. None at all.

Q. Had you been engaged in work continuously for them for the period of thirteen years?

A. Yes, sir.

Q. Were there any occasions on which you were away on vacations or any other—

A. Nothing, only pleasure.

Q. How is that?

A. I used to take a vacation once a year for about a month to visit my home. That is all.

Q. I would like to know if you were obliged to stop work on account of ill-health at any time during that period of thirteen years. A. No, sir.

(Testimony of Thomas P. Clark.)

Q. At the time of the accident what wages were you earning?

[197] A. Estimated at one hundred and seventy-five dollars a month, twenty-eight days, or six dollars and a quarter a day for ten hours.

Q. How much a month?

A. One hundred and seventy-five dollars a month, and twenty-eight days made a month on the switch engine.

Q. Now, since the accident occurred, have you earned anything in the way of wages?

A. Have I what?

Q. Have you earned any wages since the accident occurred? A. No, sir.

Q. Have you done any work, Mr. Clark?

A. No, sir.

Q. Has your condition been such that you could do any work? A. I couldn't do any work.

Q. Are you still in that condition? A. Yes, sir.

Q. What, if any, sums of money have you spent for medical treatment and medicine since the occurrence of the accident? A. Since the accident?

Q. Yes.

A. I suppose two thousand dollars or more.

Q. For what was most of that sum paid out?

A. Well, it was paid out for doctors.

Q. To which doctors?

[198] A. Some in El Paso.

Q. Do you recollect any other items that you have disbursed in connection with your illness?

A. I don't understand.

(Testimony of Thomas P. Clark.)

Q. Do you recollect any other sums of money that you have spent out on account of your illness since your accident?

A. Nothing only my living—nothing coming in.

Q. Who made the payments, you or Mrs. Clark?

A. I made it.

Q. Is Mrs. Clark familiar with the moneys you paid out for medical attention? A. I think so.

Mr. MFARLAND.—I think that would be testifying to what she knows—hearsay.

The COURT.—No, I think not. She may have paid the money.

Mr. SEABURY.—He said she paid it.

Mr. MFARLAND.—No, he said, “I” paid it.

(By Mr. SEABURY.)

Q. Can you tell what these moneys were you paid out—to whom you paid them?

A. I paid them to the doctors.

Q. Who were the doctors?

A. Cathcart was one. One was Dr. Kendall, of El Paso.

Q. Do you remember how much you paid to Dr. Kendall of El Paso? A. Not much.

Q. Did you pay Dr. Dietrich anything?

[199] A. No, sir. That is, we didn’t pay it; it was taken out of our wages.

Q. Who took the pay for Dr. Dietrich out of your pay? A. The company stopped it out of our pay.

Q. Which company?

A. The Arizona and New Mexico Railway Company.

(Testimony of Thomas P. Clark.)

Q. The defendant in this action? Do you know how much of your pay went to that doctor for his services to you?

A. No, sir, I don't know how much went to the doctor for my particular services.

(By the COURT.)

Q. Was he paid by so much a month contributed by all the employees? A. Yes, sir.

(By Mr. SEABURY.)

Q. So he was your doctor at that time?

A. Yes, sir.

Q. What other doctors did you make any payments to, if any? A. Dr. Fayles.

Q. Do you recall how much you paid to him?

A. Something over two hundred dollars.

Q. Were these expenditures that you made necessary in connection with your illness? A. Yes, sir.

Q. Did you regard them reasonable for what services you received?

A. I thought they were very reasonable.

[200] Q. Mr. Clark, when you fell from the engine, what part of your body did you strike on, do you recall?

A. I struck on this side here (indicating left shoulder and back of head). My left shoulder and back of my head and my hip.

Q. Your left shoulder and your back and hip?

A. Yes, sir.

Q. What was your condition immediately after the fall? Were you conscious or unconscious?

A. I was conscious.

(Testimony of Thomas P. Clark.)

Q. Did you feel like yourself, or how did you feel?

A. Pretty badly hurt.

Q. Just describe briefly your sensations at that time.

A. I was in awful pain, I know. Couldn't breathe hardly and couldn't move much. It was with difficulty that I could move at all on account of pain—couldn't hardly breath.

Q. Have you ever had any accident or injury to your person since that time?

A. Since that accident?

Q. Yes. A. No, sir.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say you have been in the employ of the Arizona and New Mexico Railway for about thirteen years? A. Yes, sir.

Q. Up to that time—the time of the accident?

[201] A. Yes, sir.

Q. During that term of service in what capacity were you employed? A. Locomotive engineer.

Q. All the time? A. All the time.

Q. In the yards or on the main line?

A. On the main line and in the yard too—both. Mostly on the main line.

Q. Well, for about five years immediately preceding the accident, where were you working?

A. I was on the Arizona and New Mexico Railway.

Q. As to the yards or main line?

(Testimony of Thomas P. Clark.)

A. Main line, I think. I can't remember without dates.

Q. How long were you on the switch engine?

A. Two years.

Q. Continuously on the switch engine?

A. Well, I had been on the main line in the mean time.

Q. But the larger part of the time for the two years immediately before the accident you were engaged as engineer on the switch engine?

A. Yes, sir.

Q. And your duties required you to switch cars up the Shannon hill? A. Yes, sir.

Q. You did that almost every day, didn't you?

A. I presume every day.

[202] Q. And sometimes twice a day?

A. And more times than that, too.

Q. During that time how many cars would you probably switch up Shannon hill in a day?

A. Sometimes we would take up as much as twenty—some days not over eight or ten.

Q. If that was as many as eight to twenty, would you say there would be an average of fifteen cars a day? A. Yes, about that.

Q. That would be four hundred and fifty cars a month, wouldn't it?

A. Oh, I don't know, I never estimated it—about that, I guess.

Q. Nearly five thousand cars a year?

A. You can figure it up. I don't know what it would be.

(Testimony of Thomas P. Clark.)

Q. Approximately ten thousand cars in two years.

Mr. SEABURY.—We object to the question.

The COURT.—Yes, that is a matter of computation.

(By Mr. McFARLAND.)

Q. Now, Mr. Clark, during that two years that you switched cars, that you were on the switch engine that switched cars up Shannon hill, the cars were left on the main line, were they not, before switching?

A. Yes, sir.

Q. What condition were they left on the main line?

A. Cut off and left standing.

Q. No brakes set?

[203] A. Ought to be, but they were not.

Q. As a matter of fact, there never was any brakes set on cars left on the main line when switching up Shannon hill?

Mr. SEABURY.—We object to the question on the ground that it is incompetent, irrelevant and immaterial. The witness can't be expected to know the condition of every car in ten thousand.

The COURT.—He can state what he knows.

Mr. SEABURY.—We ask that the question be limited to what he knows.

(Thereupon the reporter reads the following question: Q. As a matter of fact, there never was any brakes set on cars left on the main line when switching up Shannon hill?)

Mr. SEABURY.—We object again—not confined to his knowledge.

(Testimony of Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Well, then, the two years you were engineer in charge of the switch engine—

Mr. SEABURY.—We object to the question—it is not a proper question.

The COURT.—It is still objectionable in that respect. He can't be presumed to have known unless he was there and present.

(By Mr. McFARLAND.)

Q. So far as you know, during the two years you were engineer on the switching engine, were the brakes set upon the cars left standing on the main line before being switched up Shannon switch?

[204] A. As far as I know there was not any brakes set on them at all.

Q. That was true during the entire two years that you had charge of the switch engine?

A. Yes, sir.

Q. As I understand you, it was the method pursued down there in switching cars from the main line up the Shannon switch to leave them on the main line without brakes being set?

Mr. SEABURY.—We object to the question. I don't think the witness has testified as to that. We object to its competency and to its materiality. Nothing to do with this particular accident or how it occurred.

Mr. McFARLAND.—It may be very material.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

(Thereupon the reporter reads the following ques-

(Testimony of Thomas P. Clark.)

tion: Q. As I understand you, it was the method pursued down there in switching cars from the main line up the Shannon switch to leave them on the main line without brakes being set?)

The WITNESS.—They were left on the main line, but I wouldn't say whether the brakes were set or not. It was not my business to know.

(By Mr. McFARLAND.)

Q. There were brakes set so far as you know?

A. No, sir.

Q. Where were these cars brought from on the main line [205] on the day of the accident?

A. Where were they brought from?

Q. Yes. A. What we call Hill's flat.

Q. That is a short distance east of the point where the accident happened? A. Yes, sir.

Q. Now, what time a day was it?

A. About nine o'clock in the morning we went after them and pulled them over.

Q. About nine in the morning? A. Yes, sir.

Q. Had those cars set there the night previous?

A. I don't know—I presume they had.

Q. You found them there in the morning when you went there? A. Yes, sir.

Q. How far did you pull them from Hill's flat up to and on the main line in front of the Shannon store?

A. We pulled them so that eight of the cars would remain on the main track south of the Shannon crossing, and cut them off.

Q. Was the first cut you made there?

(Testimony of Thomas P. Clark.)

A. We left the eight there and went up Shannon with the other four.

Q. Was the first cut you made south of the road crossing [206] the track at or near in front of the Shannon store? A. Yes, sir.

Q. Then you took those eight up the main line past the switch and then backed them up the Shannon switch?

A. No, sir, we left eight cars south of the Shannon crossing and went up on the Shannon hill with four.

Q. That is what I speak about—the first four.

A. Yes.

Q. Now, when you were coming up Shannon hill were the eight cars where you made the first cut?

A. Yes, sir.

Q. They hadn't moved so far as you know?

A. No, sir.

Q. Then you pulled those eight cars down toward Shannon switch? A. Yes, sir.

Q. How far?

A. Pulled them across the Shannon crossing all together and up so that four would clear the Shannon switch.

Q. That is the four that remained or the four that you took away?

A. So that the four we cut off were left there so that they would clear the switch.

Q. Would clear the Shannon switch?

A. Yes, sir.

Q. That is so they would not collide with the train going up Shannon switch? [207] A. Yes, sir.

(Testimony of Thomas P. Clark.)

Q. How far were those four cars left from the Shannon switch?

A. In to clear Shannon switch probably one hundred feet.

Q. Then it would be one hundred feet south of Shannon switch?

A. Of the switch, but not one hundred feet south of where they would clear.

Q. I am speaking about the switch.

A. Yes, the switch.

Q. The frog is still south of the switch?

A. Yes, sir.

Q. How far south?

A. I don't know just what the lead of them tracks is. Oh, I should say maybe sixty feet.

Q. Then the cars would be forty feet again south of the frog? A. Yes, sir.

Q. You are satisfied that is about the position you left the last four cars—about forty feet south of the frog? A. Yes, sir, about.

Q. When you took the second four cars you pulled them up the main track past the switch and up towards the point of rocks? A. The second four?

Q. Yes. [208] A. Yes, sir.

Q. And then backed up the main line up to the Shannon switch and then got part way up the Shannon switch? A. Yes, sir.

Q. While you were backing those cars up—the second four cars—did you get any signal to stop?

A. Yes, sir.

Q. Where was your engine when you got that sig-

(Testimony of Thomas P. Clark.)

nal? A. Where was the engine?

Q. Yes. A. Approaching the frog.

Q. How far? A. Just passing the switch.

Q. That would put within about sixty feet of the frog? You say the frog was sixty feet south of the switch? A. Yes.

Q. And you are quite sure you didn't get that signal until your engine had got to the switch?

A. Past the switch.

Q. Past the switch?

A. Just to the switch—about there.

Q. That was sixty feet from the frog?

A. Yes, sir.

Q. Did you make any effort at that time to stop the train? A. Yes, sir.

Q. What did you do?

A. Applied the air with full force.

[209] Q. Did you do anything else?

A. I couldn't do anything else—shut off the steam and applied the air—couldn't do anything else.

Q. Then that would be about sixty feet from the point where you applied the air to the place where the collision occurred? A. About that.

Q. Could it have been more?

A. That is near enough.

Q. Couldn't be less? A. That is near enough.

Q. At what rate of speed were you running?

A. About six miles an hour.

Q. Do you know what distance that engine and the train of cars on that grade could be stopped, running at six miles an hour? A. Yes, about.

(Testimony of Thomas P. Clark.)

Q. What? A. About.

Q. What distance? A. Sixty or eighty feet.

Q. Sixty or eighty feet?

A. You are speaking about the engine?

Q. Yes, speaking about the engine. In what distance could [210] the train be stopped going six miles an hour upon the application of air as you say you made it—going six miles an hour?

A. I couldn't do much with that. Here is a couple of hundred—three or four hundred tons—there was no braking power on those four cars—the engine alone was all.

Q. If you had applied the air as you say you did on getting that signal at the point you were, couldn't you have stopped that train within seventy feet?

A. No, sir.

Q. What distance would it require for you to stop it with the air on the engine and no brakes being set on the other four cars?

A. I never used the brakes on the other four cars.

Q. Assuming that there were no brakes on the other four cars. That they were simply loose. The only power you had was your engine?

A. That is all.

Q. Now, in what distance could you stop that train with the engine by the direct application of air, the engine going six miles an hour?

A. In a hundred and fifty feet.

Q. No less? A. No.

Q. You couldn't have stopped in seventy feet?

A. Seventy feet?

(Testimony of Thomas P. Clark.)

Q. Yes. A. I don't think so.

[211] Q. If you could do it and had done it you would not have had this collision?

A. Oh, yes, we would.

Q. In seventy feet? A. You say seventy feet?

Q. Yes.

A. Oh, yes, we would. Couldn't stop it in time for that.

Q. In other words, you say you couldn't stop that train in seventy feet? A. No, sir.

Q. Did you take any particular notice at what point you were when you got that signal?

A. We were close to the frog.

Q. Close to it? A. Yes.

Q. Well, how far were you from it—close on to it is rather indefinite? A. Twenty-five feet, maybe.

Q. Five feet? A. Twenty-five feet.

Q. Twenty-five feet from the frog when you got that signal? A. Yes, sir.

Q. Didn't you say a while ago that your engine was at the switch when you got that signal?

A. I said it was between the switch and the frog—that is about where it was.

Q. Didn't you say it was at the switch?

[212] A. No, I don't think I did.

Q. Didn't you say that you had just got on the switch? A. Did I say that?

Q. I say didn't you say that—I am asking you?

A. I guess I said between the switch and the frog—closer to the switch, probably.

Q. And by the application of straight air you

(Testimony of Thomas P. Clark.)

couldn't have stopped that train before the collision occurred? A. No, sir.

Q. Now, it is some little distance south of the frog where the collision occurred, wasn't it?

A. South of the frog?

Q. Yes. A. Yes, sir.

Q. How many feet? A. Probably ten.

Q. No more? A. About that.

Q. About ten feet? A. Yes.

Q. Now, if your engine was at the switch, and it is sixty feet from the switch to the frog and ten feet from the frog to where the collision occurred, that is seventy feet. Now, do you undertake to say that you could not have stopped that train by the application of direct air, in seventy feet?

[213] A. That is what I say.

Q. Impossible? A. Yes, sir.

Q. It couldn't be done? A. No, sir.

Q. Was there any perceptible slackening of the speed of your engine or that train after you got the signal and before the collision?

A. Yes, there was.

Q. To what extent was that true?

A. We were almost stopped.

Q. What?

A. We got down to three or four miles an hour.

Q. So that when the collision occurred your train was going about three miles an hour?

A. About that—four, maybe.

Q. Now, what was your position on the engine when you got this washout signal?

(Testimony of Thomas P. Clark.)

A. I was at my post on the right side.

Q. Which way was your face?

A. Facing south.

Q. Your face was toward the south?

A. Yes, sir.

Q. When you got the signal? A. Yes, sir.

Q. Now, wasn't the window just in front of you in the cab?

[214] A. There was a window way—no window.

Q. Perfectly open? A. Yes.

Q. Couldn't you see down that line of cars from that window? A. No, sir.

Q. You couldn't? A. No, sir.

Q. Wouldn't that window enable you to see on the outside of the cars just in front of you on the train?

A. On the opposite side?

Q. No, on the same side. A. No, sir.

Q. You can't see from your cab down the side of the train at all?

A. No, sir, not on this occasion.

Q. Why not?

A. Because of the cars behind the tender.

Q. Were those cars the same width as the cab of your engine? A. About.

Q. So the cars filled out flush with the engine and obstructed your view? A. Yes, sir.

Q. That is true, is it? There wasn't space enough at that window to let you see down that train of cars in the direction you were going?

[215] A. No, sir.

Q. You say the width of that cab was practically

(Testimony of Thomas P. Clark.)

the same as the width of the freight-cars in front of you? A. Yes, sir.

Q. Practically no difference?

A. I never measured to a fractional part of an inch, but it is estimated about the width of a box or stock-car.

Q. Isn't the cab of the engine wider?

A. Not usually. It is occasionally narrower.

Q. That particular engine?

A. That is about the same width as a box-car.

Q. As a matter of fact, isn't that cab about ten inches wider than an ordinary box-car?

A. No, sir.

Q. If it was, could you have seen out of that window down that line of cars?

A. There was a box-car right behind the tender that stopped me from seeing anything.

Q. If the cab was ten inches wider than that car, that would give you five inches on that side of space wider than the box-cars. If that is true couldn't you have seen down that line of cars? A. No, sir.

Q. Why not?

A. Because the curve took it away from me.

Q. You say you paid Dr. Dietrich. Did I understand you to say that? A. Yes.

[216] Q. Didn't you get what pay, if any—or didn't you pay, if anything at all—wasn't the payment, if any was made at all, out of the benevolent association? A. Didn't I pay out of that?

Q. No, wasn't it paid by the benevolent association—anything paid on account of Dr. Dietrich?

(Testimony of Thomas P. Clark.)

A. I don't know what they done with the money after they took it out of our pay.

Q. You mean to say that you contributed monthly each month? A. Yes, sir.

Q. It was that money you paid? A. No.

Q. Did they take any money out of your pocket and give it to Dr. Dietrich?

A. Not to Dr. Dietrich; no, sir.

Q. Didn't you contribute monthly so much toward the hospital fund—hospital dues?

A. Didn't I contribute?

Q. Yes. A. I did for years.

Q. Now, it was out of that fund that it was paid, wasn't it? That Dr. Dietrich was paid, if he was paid at all?

A. I don't know whether Dr. Dietrich was paid at all. I don't know anything about it.

Q. You didn't pay anything yourself?

A. Only what was taken out of my pay. I didn't go into my pocket.

[217] By the COURT.—Was anything taken out of your pay after the accident?

The WITNESS.—No, sir. I never received any pay.

(By Mr. McFARLAND.)

Q. Wasn't it true that all the employees of the Arizona and New Mexico Railway Company contributed monthly to the benefit fund?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial and not proper cross-examination.

(Testimony of Thomas P. Clark.)

The COURT.—I think so. There is testimony before the jury that he has expended something like two thousand dollars in payment of doctor bills and so forth—a general statement to that effect. He stated Dr. Dietrich was paid and some other physicians. The question is whether he paid anything to Dr. Dietrich for which he may recover in this suit.

Mr. SEABURY.—That is not the question to which I object. The questioning continues: "Isn't it a fact other employees of this road made the same contribution to this hospital fund that you made?" It is incompetent, irrelevant and immaterial to this case.

Mr. McFARLAND.—That is to get at the fact of payment.

Mr. SEABURY.—We understand the fact of payment—no dispute about that.

The COURT.—Wouldn't it make a difference as to the recovery in this case? If he hasn't expended anything by virtue of this accident, he cannot recover it.

[218] Mr. SEABURY.—Certainly not, but that can't affect contributions other employees made.

The COURT.—It is clearing up the statement he made as to the character of the payment made to Dr. Dietrich.

Mr. KIBBEY.—That is it, your Honor.

The COURT.—I understand that he is paid just as physicians of mining companies are frequently paid, out of some company fund to which the employees contribute. I take that to be the case here,

(Testimony of Thomas P. Clark.)

and if that has sufficiently developed, that is sufficient. You don't claim anything by virtue of any payment made to Dr. Dietrich?

Mr. SEABURY.—No, your Honor, not by way of recovery.

The COURT.—He said it came out of his pay. That is the thing that ought to be cleared up, and I understand that it is cleared up.

Mr. SEABURY.—Do I understand the question is allowed?

The COURT.—It is withdrawn, I understand.

Mr. SEABURY.—I didn't hear its withdrawal.

The COURT.—It is withdrawn, is it, Mr. McFarland?

Mr. McFARLAND.—Yes. It is only to show how this was done.

(To the witness.)

Q. Now, Mr. Clark, you say you paid out certain sums of money on account of medical treatment for these injuries, and I understood you to say you paid out about two thousand dollars.

A. Not directly for medicine, of course, or for doctors, [219] but my expenses and like of that would amount to that.

Q. How much have you paid to doctors?

A. Well, I would have to go back and hunt it up.

Q. I don't understand you.

A. I would have to figure it up.

Q. You said you paid Dr. Fayles two hundred dollars? A. Yes, sir.

Q. For treatment on account of the injuries?

(Testimony of Thomas P. Clark.)

A. Yes, sir.

Q. Now, who else did you pay any money to?

A. I paid for treatment to scientists in Texas.

Q. When—who was it you paid it to—in Los Angeles or El Paso?

A. I paid some to Dr. Kendall.

Q. How much did you pay Dr. Kendall?

A. To get my eye treated.

Q. How much?

A. Some twelve or fifteen dollars.

Q. Who else? What other doctor?

A. Cathcart.

Q. Where does he live? A. In El Paso.

Q. What did you pay him?

A. I don't know—probably fifty dollars.

Q. Now, what other physician did you pay?

A. Ah, that is all now.

Q. What? [220] A. That is all now.

Q. Twelve or fifteen dollars to Dr. Kendall, two hundred dollars to Dr. Fayles and fifty dollars to Dr. Cathcart. Did you have any conversation with Dr. Kendall while he was treating you? At El Paso?

A. I was there to get my eye treated. We had a business conversation probably.

Q. Did you have any conversation about your eye?

A. He treated it.

Mr. SEABURY.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—The objection is overruled. They may be laying the foundation for an impeaching question.

(Testimony of Thomas P. Clark.)

(By Mr. McFARLAND.)

Q. Did you have any conversation about your eye?

A. I went to have it doctored—repaired.

Q. Did he examine your eye? A. Yes, sir.

Q. Did he give you a certificate that you would not see any more out of that eye?

Mr. SEABURY.—We object to the question.

The COURT.—I sustain the objection.

(By Mr. McFARLAND.)

Q. Did you tell him how the accident occurred?

A. I didn't tell him anything about it.

Q. The result of which you lost your vision of one eye?

The COURT.—Is this to lay a foundation for a contradictory statement?

[221] Mr. McFARLAND.—I don't have to do that.

The COURT.—Ordinarily you do if you are going into an examination of this kind, with reference to his conversation after the injury.

Mr. McFARLAND.—Not with the party to the suit. With another witness you would have to *pay* the ground for impeachment.

The COURT.—I don't understand there is any difference as to that. I think the rule is, certainly the rule we have applied in the territorial courts, that cross-examination is restricted to matters drawn out on direct examination even in the case of parties to the suit, although some liberality is exercised in that respect. But in general the rule is that you confine

(Testimony of Thomas P. Clark.)

your examination to something brought out on direct examination.

Mr. KIBBEY.—With a party we may go into any part of the plaintiff's case.

The COURT.—If he testified to the cause of action, you may go into anything touching the cause of action, but conversations subsequent to the transaction itself is a different thing altogether.

Mr. SEABURY.—We desire to show in this case that the person with whom this person is supposed to have had the conversation is his doctor and that the conversation took place during the existence of the protected relation, and therefore [222] the witness is incompetent to testify, and we wish to rely on that relation to exclude this testimony.

The COURT.—You don't think the other point is good, then?

Mr. SEABURY.—I think they are both good, your Honor, but the question is, did you have a conversation; if so what was the conversation? It is impossible to tell before hearing the conversation whether it is covered by the rule.

The COURT.—It is possible that he may have made some admission in the hearing of a third party, but I think still that the evidence is incompetent on the ground that it is not proper cross-examination, unless it is for the purpose of laying the ground for an impeaching question.

Mr. McFARLAND.—The difficulty of that is that he testified this party treated him and he paid him ten or fifteen dollars for the treatment. Now, I don't

(Testimony of Thomas P. Clark.)

know whether Dr. Kendall is a physician or not—I don't know whether he is a licensed practitioner.

The COURT.—It may be inquired about, but this is something in relation to a conversation the witness had in regard to his eye. The objection is sustained.

Mr. McFARLAND.—It is very material, for we can't introduce admissions against interest without laying the foundation. In view of the ruling of the Court—

The COURT.—I understood you to say it was not your purpose to show contradictory statements by this witness.

Mr. McFARLAND.—I don't know any other way to lay the foundation but this.

[223] The COURT.—It is proper to bring out statements from this witness so that they may be contradicted, if he has stated to the doctor or anyone else matters with reference to his condition or the condition of his eye contradictory to anything he has already testified to. That may be shown, provided by showing it you do not violate the rule as to confidential communications. That I understand you to say you do not aver now. The objection is sustained.

Mr. McFARLAND.—Just a moment, if your Honor please.

(To the witness.)

Q. I ask you this question and do not want you to answer until the counsel has an opportunity to object. When this gentleman, Mr. Kendall, was treating you in El Paso, didn't you ask him for an opin-

(Testimony of Thomas P. Clark.)

ion as to whether or not from the condition that your eye was then in, if he would not give you a certificate that you lost that sight in this accident, and whether he didn't reply—

Mr. SEABURY.—We object to counsel stating the alleged reply and in that way getting the substance of the answer before the jury.

Mr. McFARLAND.—I can't do it any other way.

Mr. KIBBEY.—He can ask what the conversation was that he had and ask him to state the conversation, which is perfectly proper on cross-examination.

The COURT.—That might or might not be the case. If this evidence is admissible he may put the question whether he did not at a certain time and place state a certain thing. It would be improper, however, I think, for the witness under any circumstances to state what this man may have replied as to [224] what Dr. Kendall said, except as a necessary part of the statement that the witness may have said.

Mr. McFARLAND.—That is true, and we limit our question to that.

Mr. SEABURY.—I ask that counsel be asked to put another question.

The COURT.—I don't think the Court can do that. The mere fact that it may contain a suggestion you say is not enough to exclude it. The jury should be cautioned, perhaps, not to take for granted anything put into a question in a hypothetical way.

Mr. SEABURY.—I desire to object further that it is not in proper form as now presented.

The COURT.—The question was not finished in its

(Testimony of Thomas P. Clark.)

present form. You may state it again.

Mr. McFARLAND.—Will the reporter please read the question?

(Thereupon the reporter reads the following question: 1. I ask you this question and do not want you to answer until the counsel has an opportunity to object. When this gentleman, Mr. Kendall, was treating you in El Paso, didn't you ask him for an opinion as to whether or not from the condition that your eye was then in, if he would not give you a certificate that you lost that sight in this accident, and whether he didn't reply—)

Mr. McFARLAND.—(Finishing the question.)—by saying that he did not believe its vision was lost in the accident—the vision of that eye was lost in the accident.

Mr. SEABURY.—We object to the question as incompetent, [225] irrelevant and immaterial and not proper in form.

The COURT.—Is that all the conversation?

Mr. McFARLAND.—Yes.

Mr. SEABURY.—I also desire to prove if I can that Kendall was a physician or surgeon and treating him in that capacity.

The COURT.—Prove what?

Mr. SEABURY.—That the person with whom he was having the conversation was consulted by him professionally as an oculist or doctor, and if this conversation or talk did take place it related to a conversation between patient and physician and as such was privileged under section six, paragraph 2535,

(Testimony of Thomas P. Clark.)

Arizona Revised Statutes of 1901.

The COURT.—How do you answer that contention?

Mr. McFARLAND.—I don't know that he is a physician.

The COURT.—Your question assumes it.

Mr. McFARLAND.—It is a conversation between these two people. Now, as a matter of fact, I think I can truthfully state to the Court that he is not a practitioner, not an optician.

The COURT.—You are not a witness as yet—you are not a witness on the subject.

Mr. McFARLAND.—The Court asks me that question and I give that reply.

The COURT.—Your question assumes the existence of that relation, it seems to me. The objection is sustained. I think it is improper.

Mr. McFARLAND.—We except.

[226] (To the witness.)

Q. Did you report to Mr. Thompson after that accident at any time that you were all right and ready to go to work? A. No, sir.

Q. You never did? A. No, sir.

Q. Didn't you ask to be reinstated in your position as engineer of the switch engine? A. No, sir.

Q. You never offered to go back to work?

A. No, sir. I gave them a proposition of an agreement of what I would accept, and he would not discuss the matter.

Q. Wasn't that a proposition to go back to work on the switch engine?

(Testimony of Thomas P. Clark.)

A. It was a proposition when I was able, yes. I didn't report for work.

Q. Wasn't it a proposition to go back on the switch engine then?

A. Simply an option on the switch engine is all.

Q. He offered to put you on the slag engine and you would not accept?

A. I couldn't. I wasn't able to work.

Q. Didn't you tell him that if he would *put on* the switch engine you would go back to work at once?

A. No, sir.

Q. Wasn't that within two months after the accident? [227] A. No, sir.

Q. What time was it?

A. I don't know as it happened at all.

Q. You never talked to him about going back to work?

A. I made him a proposition there when I was able — I just simply came for a talk and he wouldn't talk to me.

Q. Nothing said in that conversation about going back to work on the switch engine at all?

A. No, sir.

Q. Was nothing said in that conversation about the company giving you some position on the slag engine? A. They offered that, I believe.

Q. You say that they did or did not offer it?

A. They offered me the slag engine.

Q. What wages? A. I don't remember.

Q. The same as you were getting on the switch engine? A. Yes.

(Testimony of Thomas P. Clark.)

Q. That was how long after the accident?

A. Four months.

Q. Didn't you offer to go back then and there if they would give you the switch engine, but wouldn't go back to work on the slag engine?

A. The slag engine job didn't exist at all—wasn't nothing of it—hadn't been running for some time.

Q. Didn't they offer you a hundred and seventy-five dollars a month to run that as engineer?

A. Yes, but it didn't run.

[228] Q. What difference did it make to you if they gave you a hundred and seventy-five dollars a month?

A. It would make a difference of a hundred and seventy-five dollars if I didn't work.

Q. If they gave you a hundred and seventy-five dollars a month it didn't make any difference how often you worked, did it?

A. They didn't offer that—they didn't offer anything.

Q. Did the company have any rules governing the transaction of their business in the operation of their trains? A. Yes, sir.

Q. Did you have one of those books?

A. Yes, sir.

Q. Did you know what the rules were?

A. Yes, sir.

Q. You had one of those books at the time of the accident? A. Yes, sir.

Q. And had had it for a good long while before?

A. Yes, sir.

(Testimony of Thomas P. Clark.)

Q. And knew what the rules were? A. Yes, sir.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. KEARNEY.)

Q. What is the length of defendant's railroad? Between what points does it run to?

A. From Clifton, Arizona, to Hatchita, New Mexico.

[229] Q. What distance is that?

A. About one hundred and nine miles.

Recross-examination.

(By Mr. McFARLAND.)

Q. I ask you if about a month after the accident—probably a month or six weeks—if you didn't report to Mr. Reissinger, the superintendent of the road, that you were all right and ready to go to work?

A. No, sir.

Q. You never had that conversation with him at all? A. With superintendent Reissinger?

Q. Yes.

A. I never mentioned anything about the accident to him.

Q. And never had any conversation with him at all? A. No, sir.

Q. At no time? A. After the accident?

Q. Yes. A. No, sir, not after the accident.

Mr. McFARLAND.—That is all.

(Witness excused.)

[Testimony of Louis Dysart, for Plaintiff.]

LOUIS DYSART, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

A. Louis Dysart.

[230] Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. How long have you been engaged in that profession? A. Seventeen years and a half.

Q. Where do you practice?

A. In Phoenix, Arizona.

Q. How long have you practiced in Phoenix, Arizona? A. Eight years.

Q. Please state what medical education you have had.

A. I am a graduate of the College of Physicians and Surgeons of Chicago, ex-interne of Cook County Hospital, Chicago, and served for a year and half in charge of the Mexican Central Hospital at Tampico, Old Mexico, and three years and a half as surgeon at Chemulpo for the same company, and two years for the Copper Queen Company and the El Paso and Southwestern at Bisbee.

Q. And during all that time you were engaged in general practice? A. Yes, sir.

Q. Did you, during that time, come in contact much or little with cases of personal injuries?

A. A great many cases; yes, sir.

(Testimony of Louis Dysart.)

Q. Do you know the plaintiff in this case, Thomas P. Clark? A. Yes, sir.

Q. When did you first meet him?

A. It was November 5th.

[231] Q. Of what year? A. Of this year.

Q. Where did you see him? A. At my office.

Q. Did you examine him at your office then or shortly after? A. Yes, sir.

Q. Who was present when you examined him, Doctor?

A. Dr. Craig was present and Dr. Brownfield, and his wife was there part of the time.

Q. That is Mrs. Clark?

A. Yes, sir; Mrs. Clark.

Q. Now, Doctor, will you please tell us what the examination was that you made—what it included? Tell us all about it.

A. I made an examination of the chest and of the spine and of the head, and an examination of the urine and a test of the blood pressure.

Q. What did you find was the condition around the chest?

A. I found that there was an irregularity in the third and fourth ribs on the right side in front, and found some tenderness over the lower ribs on the left side—the eleventh or twelfth.

Q. Did the examination of that part disclose whether or not there had been any fracture of the ribs?

A. The third and fourth ribs on the right side had undoubtedly been fractured.

(Testimony of Louis Dysart.)

[232] Q. Could you tell whether it was an old fracture or a recent one?

A. It was an old fracture.

Q. By that you couldn't estimate, could you, about when the fracture occurred?

A. Well, I would say that it had not occurred within the last month or six weeks; that it was longer ago than that.

Q. Do you say there was still some tenderness present in that neighborhood on the left side?

A. Yes, sir.

Q. What did you find in reference to his spine and back, if anything?

A. I found no displacement of any of the bones of the spine. There was some tenderness along the spine.

Q. What did you find in reference to his head, if anything?

A. The head outside of the eye was negative—I found nothing.

Q. What did you find with reference to his urine?

A. The urine contained albumen and tibe casts.

Q. What does that indicate?

A. An inflammation of the kidneys.

Q. What, if any, trouble did you find him to be suffering from at this time?

A. He was suffering from Bright's disease.

Q. Advanced or otherwise?

A. Chronic Bright's disease.

Q. What did you find with reference to his blood pressure?

(Testimony of Louis Dysart.)

[233] A. The blood pressure was increased—it was higher than it should be.

Q. What was it, do you recall?

A. Two hundred and twenty millimeters of mercury. That is, sufficiently high to support a column of mercury two hundred and twenty millimeters high.

Q. What would be the normal blood pressure in a man of sixty-five or sixty-seven years of age?

A. From one hundred and fifteen to one hundred and thirty or possibly thirty-five.

Q. What does that increased blood pressure indicate, Doctor?

A. It is a condition that goes with an inflammation of the kidneys—with chronic Bright's disease.

Q. Directly attributable to that, is it?

A. Yes, sir.

Q. Are you familiar, Doctor, with the ordinary probability of life of a man sixty-five years of age, if he is well and has been able to work continuously for a period of thirteen years prior to an injury?

A. Yes, sir.

Q. What would you say the probability of life is in such a case?

[234] A. Very close to eleven years.

Q. About eleven years? A. Yes, sir.

Q. What would you say are the inducing causes of Bright's disease?

A. The cause of Bright's disease are the specific fevers, poisoning by lead or any other metallic poisons, syphilis, exposure to cold. Those are about

(Testimony of Louis Dysart.)

the only causes.

Q. Will you enumerate the specific fevers?

A. Scarlet fever, smallpox, rheumatism, pneumonia, typhoid fever, mumps and measles. I believe I mentioned scarlet fever.

Q. Can you say that Bright's disease is the ordinary and probable result of any one of these specific fevers?

A. It frequently results as due to these fevers.

Q. With what frequency would you say Bright's disease would result from pneumonia?

A. Changes are found in the kidneys of those dying from pneumonia in close to twenty-five per cent of the cases. The cases which die are presumably the more severe cases and would be complicated by nephritis in more cases than those that get well. Probably ten to fifteen per cent of the cases of pneumonia would show inflammation in the kidneys. About forty per cent of pneumonia cases die. So I would say in all cases of pneumonia there would probably be between ten to fifteen per cent showing inflammation of the kidney.

Q. Which is Bright's disease? A. Yes, sir.

Q. Is Bright's disease the same thing as nephritis? A. Yes, sir; that is what it means.

Q. Nephritis is the same thing as Bright's disease? [235] A. Yes, sir.

Q. Now, Doctor, assuming that the plaintiff in this case received a severe injury in March, 1911; that at that time he was about sixty-five years of age; that for thirteen years immediately prior to

(Testimony of Louis Dysart.)

the accident he had continuously worked as locomotive engineer, except such times as he had been absent for vacations; that during the entire period of thirteen years' service he had not lost a day's work by reason of illness; that on the 15th day of March, 1911, he was thrown from an engine on to the ground as the result of a severe impact of cars; that he struck the back of his head; that he struck the back of his left shoulder and his hip; that within two days thereafter pneumonia developed; that thereafter he became cured of his pneumonia; could you say with reasonable certainty that the condition of nephritis which you found him to be suffering from when you examined him in November, 1912, was the natural and probable result of that pneumonia?

A. There would be a reasonable probability that his nephritis—inflammation of the kidneys—came as a result of the pneumonia. That would be the reasonable conclusion.

Q. Did you make any extended examination of the plaintiff's eye in November, 1912, when you saw him?

A. I was with Dr. Brownfield when he examined the eye.

Q. Did you see the various tests that Dr. Brownfield applied to him to ascertain whether he had vision or not?

A. I saw a good many of them, not all.

Q. Did you make such an examination as would enable you to say whether or not the plaintiff has any vision in his left eye at the present time?

(Testimony of Louis Dysart.)

A. Yes, sir.

[236] Q. What would you say in reference to that matter? Has he or has he not?

A. The eye is blind.

Q. You mean by that that he cannot see at all out of it? Has he any sight at all left in that eye?

A. He can see, possibly, light which would amount to the amount of light that he could—with the eye open—which he might see with the other eye with the lid closed.

Q. And about what degree of light would that be?

A. A strong light he could possibly perceive—tell the difference between that and absolute darkness.

Q. Could he, however, distinguish any objects?

A. No objects.

Q. Would the intensity of light make any difference with the ability to distinguish any objects with that eye? A. We tested with strong light.

Q. And you found him to be totally blind?

A. Totally blind; yes, sir.

Q. Was your examination sufficient to enable you to say with reasonable certainty whether that condition of blindness was the natural and probable result of the shock to the plaintiff's head on March 15th, 1911?

A. My part of the examination was not such as would determine that point.

Q. I think that is all.

Mr. KIBBEY.—We don't want to ask the doctor any questions.

(Witness excused.)

The COURT.—We will take a recess until nine-thirty to-morrow morning, and meanwhile the jury will bear in mind the admonition of the Court not to talk to anyone about the case.

(Thereupon the Court takes a recess.)

[237] Thursday, November 14, 1912.

At nine thirty-five A. M. this day, the plaintiff being present in person and represented by his counsel, and the defendant being present by its counsel, the jurors come into court and are called by the Clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

[**Testimony of Robert R. Brownfield, for Plaintiff.**]

ROBERT R. BROWNFIELD, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

A. Robert R. Brownfield.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been engaged in that profession? A. Nine years and a fraction.

Q. Where do you now practice?

A. In Phoenix, Arizona.

Q. Will you tell us, please, what preliminary education you have had in your profession?

A. State University of Nebraska, State Univer-

sity of Kansas, one year with Dr. —— in special study—

Q. Where was that?

(Testimony of Robert R. Brownfield.)

A. Kansas City, Missouri. New York Polyclinic, New York City.

Q. Have you made a specialty of any study connected with the eyes? A. I have.

Q. Is it part of your profession as physician and surgeon [238] to treat the eye?

A. I made a specialty of diseases of the eye, ear, nose, and throat.

Q. Do you know the plaintiff in this action, Thomas P. Clark? A. Yes, sir.

Q. Have you examined him at any time?

A. Yes, sir.

Q. When did you examine him?

A. I think it was the sixth of this month.

Q. 1912? A. Yes, sir.

Q. With whom did you examine him, if anyone?

A. Dr. Dysart was present when I examined him.

Q. Will you please tell us how you examined him and what you did in connection with your examination?

A. I assured myself for the benefit of Drs. Dysart and Craig that Mr. Clark was certainly blind in that eye.

Q. Which eye is that?

A. I think it was the left eye.

Q. How did you ascertain that fact, and how did you come to the conclusion?

(Testimony of Robert R. Brownfield.)

A. By certain tests known to specialists in diseases of the eye.

Q. Describe those tests briefly.

A. One of the most important is the Snell color test. That consists of a card with a black background with red or green letters or spots upon it. A colored glass lens is placed before the sound eye which is complementary to the color of the letters on the card. For instance, a green glass absorbs a red color and a red glass absorbs a green color. [239] So that if the green glass is put before the eye, the red of the corresponding complementary shade cannot be seen; if a red glass is placed before the eye, a complementary green cannot be seen. If a person has a good eye that is not covered with the red or green glass he sees all the spots, otherwise he simply sees the alternating spots which are red and green, first the red, a green, a red, a green, and so forth. If he is actually blind in the eye that is not covered by the complementary lense, he sees the alternating spots. If he isn't blind, he sees all of them.

Q. What other tests, Doctor, did you use?

A. The prismatic test, which consists of placing a prism before the good eye which is sufficiently strong to distort an image and displace it, causing diplopia or double vision. So that if Mr. Clark were able to see with the eye he claimed was blind, he would see double. If he was not able to see with that eye he would see single. Then there is a test with a prism that we employ in which the prism is

(Testimony of Robert R. Brownfield.)

not placed clear over the sound eye, and it is possible to make a person seeing with but one eye see double with the prism, he not knowing whether the prism was in proper position to see double or single, would be absolutely unable to know whether I expected him to see double or single at given times.

Q. Were there any other tests that you used?

A. Yes. I had him reading test type at twenty feet, and while he was reading, without him knowing what I was doing, I dropped a very strong convex lense before his sound eye which immediately shut off his reading. Nothing was placed before his other eye.

Q. Would it have been possible for him to have known that [240] his bad eye—that is to say, the left eye—was exposed and that the other eye was not exposed, so that it could read?

A. It wouldn't be possible for him to know what strength lens I placed before the eye. I might have placed a weak lens before the eye and he could go on reading. If I had placed a weak lens before the eye, which I had done previous to this, and he had been unable to read, then I would immediately have suspected that he was malingering. If he was afraid to go ahead when I placed the light lens before his eye, I would have suspected him. He did go ahead when I placed the light lens, but immediately I placed the strong lens he stopped.

Q. From your examination, what would you say with reference to whether or not he is able to see—has any vision whatever in the left eye to-day?

(Testimony of Robert R. Brownfield.)

A. He has absolutely no vision in that eye. I didn't finish in regard to my examination.

Q. Go ahead.

A. After I made the test that proved his blindness so far as subjective signs were concerned, I examined the eye with the ophthalmoscope, with which instrument it is possible to examine the interior of the eye. I found the media of the eye, especially the vitreous humor, was cloudy and more or less opaque. I could get a very slight, imperfect image of the retina, which would indicate that there was practically no sensation in the eye, although I believe there was enough of a reflex of the retina to make it possible for him to distinguish light from darkness, probably as much as a normal eye would see with the eye closed.

Q. That would not include the ability to distinguish objects?

[241] A. Not in the least—not even to distinguish the direction of the light. Simply a knowledge that there was light.

Q. Was that about all of your examination of him, Doctor?

A. Yes, with the exception of another test I made before I made the internal test. I had him reading and placed a pencil before the sound eye and it interrupted him. If his other eye had been sound it would not have interrupted him. A person with two sound eyes can be reading and a pencil or some other object can be intervened between either eye and not interfere, but if the person is reading with

(Testimony of Robert R. Brownfield.)

one eye and you place something between the good eye it immediately shuts him off. He stood up to that test all right. That, together with the questions I put to him to ascertain—to arrive at the history of the case—amounted to the examination. Then another test that is quite important in these cases is the pupillary reaction. The pupil of the blind eye does not react to light if directly focused into the eye. It will react to light focused into the sound eye—that is a reflex reaction—but if the light is thrown into the blind eye, the pupillary reaction is very slight if showing at all. And that is the case in Mr. Clark's eye.

Q. You attempted to secure a reaction?

A. Yes, sir.

Q. What was the result?

A. There was no appreciable reaction in the diseased eye. But the action of the pupil in the diseased eye when throwing light into the sound eye was quite normal, which is typical of cases of unilateral amaurosis.

Q. What would you say was the condition of the left eye at present—particularly from its being blind? What kind of [242] blindness is it, if any?

A. It is very hard to classify the kind of blindness, for the simple reason it is impossible to see the fundus of the eye. Can't tell whether there is atrophy of the optic nerve, which is probable—can't tell whether there is a rupture of the corneal coat. All we can tell is that he had a cloudy vitreous humor

(Testimony of Robert R. Brownfield.)

which is probably due to an internal hemorrhage. The condition of his eye indicates that at some time he has had a hemorrhage.

Q. Is there any possibility that the condition of his left eye will improve?

A. No, sir. All the cases that I have ever seen of this kind, and all the records that I can find of cases of this kind, go to show that Mr. Clark is permanently blind in that eye and that he never will recover any of the sight in that eye.

Q. Now, Doctor, the objective symptoms that you observed you have described? A. Yes, sir.

Q. What, if any, subjective symptoms did you observe?

A. Of course I presume the different symptoms which relied more or less upon his saying whether he could read certain type, would be classed as subjective, and aside from that I questioned him as to the immediate condition of the eye after the accident and his description of the condition of the eye and his description of the effect of the accident upon the eye soon afterwards and some time afterwards, leading up to the present time, is more or less typical of a direct injury to the eye or an injury to the head which would cause a hemorrhage into the eye.

Q. Now, Doctor, assuming that Mr. Clark was in a railroad [243] collision on March 15th, 1911; that he received at that time a severe blow upon the back of his head and also upon the back of his left shoulder and also upon his hip; that immediately after the accident there was some blood emitted from

(Testimony of Robert R. Brownfield.)
his left eye; that during—

Mr. KIBBEY.—We object to that; there is no evidence of any blood being emitted from his eye.

Mr. McFARLAND.—Only a scratch on his face, and no blood from his eye. Not a scintilla of evidence as to that.

Mr. SEABURY.—My recollection of the deposition of the witness is that he saw Mr. Clark wipe some blood from his face which came from his eye. That is my distinct recollection.

The COURT.—I didn't get that impression. Have you the deposition at hand?

Mr. SEABURY.—I think it was St. Thomas.
(Examines deposition.)

The COURT.—There was testimony indicating the presence of blood on his face near the eye?

Mr. SEABURY.—Is there not also testimony that there was a bloody condition of the eye?

The COURT.—That after the accident the eye was bloody.

Mr. SEABURY.—And that there was pus in it, too.

Mr. KIBBEY.—That was afterwards. There is no evidence of any blood in his eye. The testimony was that there was a scratch on his face and that he wiped a little blood off.

Mr. KEARNEY.—The eye was discolored.

The COURT.—The eye was discolored soon afterwards—the iris particularly.

Mr. SEABURY.—And pus present in the iris.

(Testimony of Robert R. Brownfield.)

Mr. KIBBEY.—Not in the iris—no pus present in the iris.

The COURT.—I think the question should be amended.

[244] Mr. SEABURY.—We withdraw the question.

(To the witness.)

Q. Doctor, assuming that on March 15th, 1911, Mr. Clark was in a railroad collision and received a severe blow on his head and on his left shoulder and on his hip; that then or shortly thereafter his left eye appeared to be bloody—

Mr. KIBBEY.—We object to that.

Mr. SEABURY.—Now, if your Honor please, I prefer to put my question and let counsel make their objections afterwards without making it piecemeal.

Mr. KIBBEY.—Do we have to wait until he puts the entire hypothetical question?

The COURT.—Yes. I think the question should be put as a whole and then the opportunity should be afforded to present objections to it.

Mr. SEABURY.—If counsel will state now the objectionable portion of it—apparently every time I mention blood in the eye, that is the part that is objectionable.

The COURT.—If you will put your question now, there will be no interruption, and the Court will entertain any suggestions—any objections—and if the Court thinks the question should be amended I will indicate in what particular.

(Testimony of Robert R. Brownfield.)

(By Mr. SEABURY.)

Q. Assuming that on March 15th, 1911, Mr. Clark was in a railroad accident—a collision—in which he received a severe blow on the back of the head, also on the back of his left shoulder and on his hip; that then or shortly after the left eye appeared to be inflamed—that blood was found upon his face—that the eye contained some pus; that he experienced pain in the left eye for a period of approximately thirty days—[245] perhaps longer—; that he didn't discover the loss of vision in that eye for perhaps over thirty days after March 15th, 1911; can you say with reasonable certainty that the condition of blindness which you found to exist at the present time in the plaintiff's left eye was the natural and probable consequence of that accident or injury?

The COURT.—Is there any objection to that?

Mr. KIBBEY.—Yes. I don't know that there is any evidence at all that he didn't discover the loss of vision for thirty days—three days, I understand.

Mr. McFARLAND.—The third day he discovered total loss of vision. That is his own testimony—not thirty days, but three days.

Mr. SEABURY.—I will amend the question by substituting the words three days instead of thirty days, Doctor. Is there any further objection?

Mr. KIBBEY.—I think not.

The WITNESS.—I should say that it is possible and probable that such an injury would cause an immediate blindness or a blindness that might come

(Testimony of Robert R. Brownfield.)

on gradually afterwards, due to a hemorrhage into the eye.

(By Mr. SEABURY.)

Q. Can you say with reasonable certainty that the blow I have described as occurring as I have indicated in the previous question to the back of the head would probably cause the internal hemorrhage of the eye? A. Yes, it may easily do so.

Q. And I understood you to say that the appearance of the eye to-day indicates the existence at one time of an internal hemorrhage of the eye?

[246] A. It does. I have very little doubt but what he has had an internal hemorrhage of the eye.

Q. Now, wouldn't the existence of that internal hemorrhage—or would it not—produce naturally and probably the condition of blindness which to-day exists? A. It has produced it; yes, sir.

Q. Then you attribute the condition of blindness to-day to the condition of the internal hemorrhage; is that correct? A. Yes, sir.

Q. Now, I ask you whether there is any doubt in your mind as to whether or not the injury caused the internal hemorrhage to which you have referred?

Mr. KIBBEY.—We object to the question. He is asking for an opinion whether he has any doubt in his mind.

Mr. SEABURY.—I want to find out what the witness' opinion is.

Mr. BENNETT.—The question is leading and suggestive.

The COURT.—It is that, yes.

(Testimony of Robert R. Brownfield.)

Mr. SEABURY.—I will withdraw it and put it in another way.

(To the witness.)

Q. As I understand you, Doctor, you say that the present condition of blindness results from an internal hemorrhage? A. Yes, sir.

Mr. BENNETT.—We object to the question as leading and suggestive.

The COURT.—It is merely repetition of what the witness has already stated. If the testimony has not already gone in it would be suggestive.

Mr. BENNETT.—If it is already in the question is unnecessary.

Mr. SEABURY.—I think it is necessary to bring the witness to a point by questions already asked so that I can intelligently [247] frame the question.

The COURT.—This is a very intelligent witness and will doubtless have in mind anything that he has said on the subject.

Mr. SEABURY.—Your Honor sustains the objection?

The COURT.—Yes.

Mr. SEABURY.—I except to the ruling of the Court.

(To the witness.)

Q. Doctor, as I recollect it, when you answered the hypothetical question which I asked you, you said the result of blindness might possibly, and in your opinion probably did, result from this injury. Now, I ask you whether there is any doubt in your mind as to how this condition of blindness resulted and from

(Testimony of Robert R. Brownfield.)
what cause it came.

Mr. KIBBEY.—We object to the question. Let him give his opinion, but not state the fact.

Mr. BENNETT.—The witness has given his statement, and now he is asking him—

The COURT.—He has given his professional opinion on the subject, which is, I presume, all that anyone could give without actual knowledge of the facts.

Mr. KIBBEY.—And that opinion was based upon a hypothetical question and not upon the existence of facts—he assumed the existence of facts.

The COURT.—I think that question is objectionable—whether he has any doubt or not.

Mr. SEABURY.—We desire to preserve an exception to the ruling.

(To the witness.)

Q. Doctor, tell us whether or not it is your opinion that this condition of blindness resulted from the blow previously described, received by the plaintiff upon his head on March 15th, [248] 1911.

Mr. BENNETT.—We object to the question. The witness has already answered.

The COURT.—I think so. I don't see why the question is pressed in that way. He has already given his professional opinion.

Mr. SEABURY.—If your Honor please, the other questions which I asked were objectionable too, on the ground that I didn't ask him to state his opinion, and now when I do ask him to state his opinion they object that the opinion has already been stated.

(Testimony of Robert R. Brownfield.)

The COURT.—He was permitted to state his opinion.

Mr. SEABURY.—True, in answer to one hypothetical question, and the answer was somewhat qualified, and it seems to me I have the right to find out just the extent of the qualification that the witness made to that answer to that hypothetical question.

Mr. BENNETT.—That can be ascertained by reading the answer.

The COURT.—Of course the one answer isn't necessarily conclusive. If the answer has been understood and direct, full and complete answer—that is, if the question has been understood, and a full and complete answer has been given, then the rest would be in the nature of cross-examination of your own witness on that point. To put additional questions as to determining what may possibly be in the mind of the witness—what latent doubts may be in his mind—because it is the opinion of the expert here that is evidence, and merely his opinion.

Mr. SEABURY.—If your Honor please, I don't understand that I have yet secured from this witness an expression of opinion directly as to whether or not this condition of plaintiff's eye did result from this accident.

[249] The COURT.—I thought you had that. I thought the question was, what in his opinion was the cause of the blindness.

Mr. SEABURY.—Yes, your Honor, that is true.

The COURT.—And I understood him to say that

(Testimony of Robert R. Brownfield.)

it was possible or probably that the blow on the head was the cause.

Mr. SEABURY.—I ask the witness this—mean-while I understand your Honor rules against me on the proposition?

The COURT.—Unless I am further informed showing that the question has not been fully and completely answered.

Mr. SEABURY.—Your Honor will allow me to respectfully except.

(To the witness.)

Q. Doctor, would you say that it is more or less than a matter of mere possibility that this condition of blindness resulted from the facts previously described in the hypothetical question?

Mr. KIBBEY.—He has answered that by saying possibly or probably.

Mr. SEABURY.—There is a vast difference between the two terms.

The COURT.—I think the witness may be asked to explain what he means by the terms he uses—possibly and probably. To that extent he may answer.

(By Mr. SEABURY.)

Q. Tell us, Doctor, what you mean by answering the hypothetical question by saying it might possibly or probably have resulted.

A. I mean this: there are other causes for hemorrhage into the eye, the greatest of which is nephritis, and in Mr. Clark's case the hemorrhage into the eye may have been due to the nephritis. It may have

(Testimony of Robert R. Brownfield.)

been due to the accident and it may have been due to the nephritis. It is impossible to tell from the condition of the eye at the present time which of the causes were [250] present and the real cause in his case. That is why I expressed it in a possible, doubtful manner.

Q. You also observed a condition of nephritis in Mr. Clark at the time of your examination.

A. I saw the examination of the urine; I didn't make it myself.

Q. From what you knew about the case either from Mr. Clark or from Dr. Dysart who was present at the examination, you are aware that he is now suffering from nephritis? A. Yes, sir.

Q. Do you know in what number of cases, if any, nephritis produces blindness?

A. No, I wouldn't care to state the percentage—it is rather large, but I wouldn't care to give figures on the number of cases of blindness resulting from nephritis, but it is very large.

Q. Do you know the number of cases which result from total blindness of one eye after a severe blow upon the head causing an internal hemorrhage of that eye?

A. No, I couldn't give a percentage on that.

Q. Would you say that the percentage is larger or smaller than the percentage of cases which result in blindness from nephritis?

A. I think the number of cases resulting in blindness from nephritis is very much greater than the number of cases resulting from a blow on the head,

(Testimony of Robert R. Brownfield.)

unless the blow on the head is sufficiently severe to cause either a fracture of the base of the skull or a direct injury to the eye-ball, and occasionally in cases of men past middle age a light blow on the head or to the spine causing reflex of the eye may cause total blindness in [251] one or either of the eyes or both.

Q. Now, Doctor, in your experience have you seen a great many cases of blindness resulting from nephritis?

A. Yes, I have—I see them every week.

Q. You have seen a great many in your practice?

A. Yes, sir.

Q. Have you ever seen a single case of total blindness in one eye which was the direct result of nephritis? A. Without blindness in the other eye?

Q. Yes.

A. I never have—without some effect on the sight of the other eye.

Q. Now, I ask you whether Mr. Clark's other eye is a well eye. A. It is perfectly sound.

Q. Does it indicate the slightest effect which would, in your judgment, be attributed to nephritis?

A. Not in the least.

Q. Now, is it or is it not your opinion that the condition of blindness which you find now existing in this left eye is the result of the nephritis or the result of the injury described?

Mr. BENNETT.—We object. The question has already been answered. He is now cross-examining his witness.

(Testimony of Robert R. Brownfield.)

The COURT.—It is almost a cross-examination, it is true.

Mr. SEABURY.—I think, in view of the facts developed, that it becomes important for the plaintiff to clear up with this witness the possible doubt that may exist in the witness' mind, or which may exist in the minds of the jury.

The COURT.—The question assumes something with regard to his examination, and also something with regard to the history of [252] the case that involves both the hypothetical feature and from his own examination. I have no doubt but what if there is a new element coming into the case you may put another hypothetical question involving that.

Mr. SEABURY.—I will do that, if your Honor will permit me to do it.

(To the Witness.)

Q. Now, assuming that on March 15th, 1911, Mr. Clark was in a railroad collision; that he received a blow on the back of his head and left shoulder and left hip, previously described; that thereafter an inflamed condition of his left eye existed—pus was found in it; that then about two days after this injury he had a case of pneumonia; that he also had one or more fractured ribs; that within three days after the accident there was a loss of vision in his left eye; that at that time and since, and at the present time, the right eye gave him no trouble and he was able to see from it; can you say—and further, that after the pneumonia a condition of nephritis existed; can you say with reasonable certainty

(Testimony of Robert R. Brownfield.)

whether the condition of blindness which you now find to exist in his left eye was the probable result either of the nephritis or of the blow received upon his head.

A. There is absolutely no doubt in my mind but what the blindness was caused either by nephritis or from a blow on the head—absolutely no question of that at all.

Q. It was one of those two that caused the loss of sight?

A. One of those two. The only possible doubt is which one. I can't say which one.

Q. Upon the facts which I have just given you in this last question, can you express an opinion as to which of those two [253] occurrences, namely, the condition of nephritis or the blow upon the head, more probably produced the blindness?

A. I think the most probable cause is the blow upon the head, for the reason that there is no affection in the other eye. It is possible to have a unilateral blindness from nephritis, but I have never seen one, they are so rare.

Cross-examination.

(By Mr. KIBBEY.)

Q. It is possible, isn't it, that Mr. Clark's loss of vision of his left eye occurred before the accident?

Mr. SEABURY.—I object to the question. I don't think we are here to deal with possibilities.

The COURT.—I think so. I think anybody on the jury could answer the question as well as the doctor.

(Testimony of Robert R. Brownfield.)

Mr. KIBBEY.—He has just testified that he had no doubt that the loss of vision was attributed to either the blow on the head or the nephritis—most probably the blow on the head—that would exclude any other hypothesis.

The COURT.—Of course, it is possible.

Mr. KIBBEY.—Q. Your opinion that the loss of vision in this eye was due either to nephritis or to the blow upon the head—and you think more probably from the blow on the head—is based upon facts of which you have no personal knowledge?

A. I think the fact that the plaintiff was healthy beforehand—blindness always has a cause.

Q. I understand, but you are assuming as a fact that he was in good health before, and that he had all these conditions that lead you to this opinion, except what you ascertained from the patient himself, is based upon the assumption to their truth?

[254] A. Yes, sir.

Q. Now, how closely did you examine this eye?

A. I examined it very minutely.

Q. Did you see the optic nerve?

A. No. You can't see the optic nerve through the cloudy media in front of the optic nerve. It is impossible to see the optic nerve in this eye.

Q. Now, what are the evidences of the hemorrhage there?

A. The debris and cloudiness, and I may say mottled condition and appearance of the vitreous humor, which indicates the absorption of free blood. The debris left after the absorption of free blood in the

(Testimony of Robert R. Brownfield.)
posterior chamber.

Q. Was there anything in the eye to enable you to determine where the hemorrhage occurred?

A. No, sir, I couldn't get a sufficiently clear and complete vision of the fundus to tell that. Sometimes we can, but when the media is not so cloudy.

Q. This state of blindness is due or could exist, do you think, without the optic nerve itself being affected?

A. Oh, yes, by all means, yes. Just the same as the cloudy condition of the cornea or front part of the eye could produce blindness.

Q. It is a mechanical obstruction?

A. Yes, sir. It may not be, but it could be, the same as if I held my hand over the eye, or if there was a cloudy condition of the cornea.

Q. And the optic nerve itself may be unaffected?

A. It may be.

Q. Would the hemorrhage—describe to the jury what you mean by a hemorrhage, and where that hemorrhage occurred.

[255] A. Any amount of blood, whether it is a small amount or a large amount, is a hemorrhage—especially applied to the eye. The slightest spot of blood from the smallest possible capillary either in the conjunctive, which is the outer eyeball, or in the sclerotic coat and in the ball of the eye proper, the slightest particle of blood is a hemorrhage. And the slightest portion of blood in the inner part of the eye is bound to cause trouble, because it increases the pressure of the eyeball, and in that way by pres-

(Testimony of Robert R. Brownfield.)

sure on the retina produces either an inhibition of sight or total blindness. Now, afterwards that hemorrhage, if it is slight, may be reabsorbed, but the injury is done. With a hemorrhage of any extent into the eyeball the injury is permanent—I think in ninety-nine cases out of a hundred the injury is permanent after a hemorrhage into the posterior chamber.

The eye is divided into two chambers, the anterior and the posterior, and the lens or iris is the partition. The posterior is much the larger part and contains the retina or the real seeing part of the eye, and is the vital part of the eye when it comes to sight.

Q. Now, could you determine how extensive this hemorrhage had been?

A. I can't say how extensive, but I judge that it was quite a little hemorrhage, sufficient to increase the tension of the eyeball and to pollute the interior vitreous humor, which is the semi-liquid fluid which fills the posterior chamber.

Q. Could there be a slight hemorrhage and not cause that blindness?

A. Yes, there could be a slight hemorrhage and not cause [256] total blindness. If it didn't occur in front of what we call the disk—the optic disk. If it occurred in front of the optic disk, the pressure upon the optic disk which would be increased would be sufficient to produce more or less of atrophy of the retina, and if it occurred to the side of the optic disk it might cause a blind spot in the ret-

(Testimony of Robert R. Brownfield.)

ina but not a total blindness, and then he would have what we call a restricted vision—might see to one side of the median line—one side see perfectly, and the other side not at all.

Q. Part of the field of vision obscured?

A. Yes.

Q. What is the tendency of that sort of a hemorrhage? A. As to recovery?

Q. Yes.

A. When due to hemorrhage it usually does not recover—when due to hemorrhage in the eye. When due to hemorrhage in the sheath of the optic nerve they usually recover. More frequently, however, the condition occurs from hemorrhage in the optic sheath and they recover to some extent, but when in the eyeball proper they do not recover.

Q. What is generally your prognosis in hemorrhage of the eye? A. Very bad.

Q. By that you mean to extend to total blindness?

A. As a rule, yes. It usually renders the eye useless, even if small. I usually tell the patient that if he has the other eye left he is fortunate.

Q. Does that occur soon?

A. Yes, usually at the time of the hemorrhage. It may increase afterwards, for the hemorrhage may last for several days.

[257] Q. Could you by an observation discover the location of the hemorrhage at any stage of the disease?

A. If the hemorrhage was not large before the cloudy condition was produced in the vitreous humor

(Testimony of Robert R. Brownfield.)

proper, the site of the hemorrhage can be located—sometimes an actual rupture of the retina can be found—a large rent and flap hanging down.

Q. Did you find any evidence of rupture?

A. I could not see the fundus at all.

Q. Then you found none?

A. No, sir, I couldn't find any because I couldn't see the fundus.

Q. Suppose a man had been in a normally healthy condition at the age of sixty-five years and had met with a railroad accident by which some of his ribs were fractured and by which he developed an injury to the hip, and after two or three days being confined to his bed, that he read a good part of the time—newspapers and magazines—and made no complaint whatever or allusion to his eye—either of pain in it or the loss of vision. What would be your opinion as to the probability of the injury having occurred from that accident?

Mr. SEABURY.—We object to the question as assuming a state of facts not proved. There is no testimony in the case that I can recall that he read a good part of the time. The testimony of the nurse is that he read at intervals of twenty or thirty minutes.

The COURT.—I think that is the testimony.

(By Mr. KIBBEY.)

Q. Very well. That he read at intervals of twenty or thirty minutes for a period of eight days, and during that time made no [258] complaint of injury or pain, what would be your opinion as to the

(Testimony of Robert R. Brownfield.)

injury causing the blindness within that period?

Mr. SEABURY.—We object to the question: it improperly assumes a state of facts not proven.

The COURT.—In what particular?

Mr. SEABURY.—Particularly with reference to his lack of complaint during that entire period. There is also proof that he did complain of pain in his eye—he testified he suffered pain.

Mr. KIBBEY.—I am talking about complaint.

Mr. SEABURY.—That is not material. The question is, did he have pain or not, not whether he complained of it.

The COURT.—I think I expressly excluded that—whether he had pain or did not. I think that should be excluded. In putting the question in this way they may elicit the fact to be either one way or the other.

Mr. SEABURY.—I except.

The WITNESS.—In stating my opinion, I might explain, if I may, that a hemorrhage into the posterior chamber is not necessarily painful, and that a person with one eye may see and read and not know that he is blind in the other eye until something intervenes between the good eye and the object at which he is looking. He may be unconscious of blindness in one eye for many months if he does not happen to close the good eye for some purpose or other.

(By Mr. KIBBEY.)

Q. Do you mean to say, Doctor, that a man may suddenly lose the vision of one eye and then go sev-

(Testimony of Robert R. Brownfield.)

eral months without discovering the blindness?

A. He may; yes, sir. The same as he may lose the hearing [259] of one ear and go for years without discovering it.

Q. Although it is sudden?

A. That is all the more reason for his not discovering it, because it is sudden, and a month is not a very long time; but if it had been coming on for several months—

Q. But suppose he immediately discovers it—or say he immediately discovered it within three days after an accident and made no complaint of it, but continued to read at intervals extending over a period of twenty minutes, would you attribute that loss of vision to that accident or could it not have been attributable to antecedent causes?

Mr. SEABURY.—We object to the question as incompetent and that it improperly assumes a state of facts not proved, and is not a proper hypothetical question.

The COURT.—He may answer.

Mr. SEABURY.—We except.

The WITNESS.—Will you put the question again?

(Thereupon the reporter reads the question last propounded.)

A. I don't think that that condition of facts would interfere with my former opinion that it was due to the accident, because a man might be nervous and lying in bed from an injury and read even though he might think he was injuring his eyes, and even

(Testimony of Robert R. Brownfield.)

though he might know that it was not doing him any good to read. Men are not always thoughtful of their eyes when nervous and lying in bed.

Q. You are taking into consideration, then, some rather extraordinary circumstances in giving your opinion that a man may have read and known he was injuring his eye, and nevertheless made no complaint?

A. That is very often the case. Men will sometimes abuse [260] their eyes directly against the advice of their physician—when the physician may even go so strong as to tell them they are going blind unless they stop.

Q. And while the physician is in attendance upon a patient he suddenly discovers a loss of vision and continues to read and makes no complaint either of the loss of vision or of pain—what would you say?

Mr. SEABURY.—We object to the question on the grounds already urged.

The COURT.—I don't know that I caught the question. Please read it, Mr. Reporter.

(Thereupon the reporter reads the last question propounded.)

The COURT.—Does it appear that no mention was made to the physician?

Mr. KIBBEY.—The nurse says that he didn't complain, and that was while the physician was in attendance.

The COURT.—You have reference to the loss of vision and not to the injury?

Mr. KIBBEY.—Yes.

(Testimony of Robert R. Brownfield.)

The COURT.—He may answer.

Mr. SEABURY.—Note an exception, please, Mr. Reporter.

The WITNESS.—He may— Let me have the question again, please.

(Thereupon the reporter reads the same question again.)

The COURT.—I don't think there is any evidence that he didn't complain of the pain.

Mr. KIBBEY.—The nurse says he didn't complain about the eye.

The COURT.—She says she treated the eye.

Mr. SEABURY.—Yes, that she wiped out some pus.

The COURT.—What does the nurse say on that subject?

[261] Mr. SEABURY.—The nurse does testify that he didn't complain of pain in the eye to her, but she also says that he complained of his wounds in a general way, as I understand the testimony.

The COURT.—I overrule the objection. You may answer.

Mr. SEABURY.—We except.

(Thereupon the reporter again reads the last question.)

Mr. SEABURY.—I respectfully further suggest that the question is not complete— What would you say about that?

The COURT.—I presume he takes the question in the light of what preceded it.

The WITNESS.—I don't think it would alter my

(Testimony of Robert R. Brownfield.)

opinion as to the injury. It might alter my opinion as to the peculiarities and characteristics of the patient. He might be a peculiarly stoical sort of a fellow.

(By Mr. KIBBEY.)

Q. Suppose he complained of pain in his ribs and of pain in his hip, and suppose he complained of pain in his back—would that be evidence of a stoical character?

A. In all probability the pain in his head and ribs and back was greater than the pain in his eye. I have seen a number of cases where they didn't complain of the eye at all. Pain isn't one of the characteristic symptoms of hemorrhage into the eye.

Q. Is it common?

A. It sometimes occurs, but it is not characteristic.

Q. But the lack of complaint of loss of vision or impairment of vision, would that modify your opinion in any way?

A. Well, I don't know. That is a very different question. I do not believe it would modify my opinion in any way. As I say, it might show some of the characteristics of the patient. [262] Some people don't value the vision of an eye—or don't think of the vision of one eye being gone temporarily as anything of great importance. Lots of times they think it will come back.

Q. You mean you think it is not a matter of very great importance, or the plaintiff didn't think?

(Testimony of Robert R. Brownfield.)

A. I think probably he thought it was temporary at the time.

Q. Now, suppose that within two months after that accident it had been found there was an atrophy of the optic nerve, would that affect the vision?

A. Oh, yes.

Mr. SEABURY.—We object to the question; there is no proof that any such condition existed.

Mr. KIBBEY.—That is true, but I am cross-examining.

The COURT.—You may make him your own witness as to other facts.

Mr. KIBBEY.—And I cannot cross-examine.

Mr. McFARLAND.—You may base your hypothetical question on facts proven or on those that will be proven.

The COURT.—How is the Court to know what is to be proven?

Mr. McFARLAND.—That is for the Court to instruct the jury as to the effect of such testimony. For instance, if the hypothetical question is not based upon facts, the Court may instruct the jury that that evidence is absolutely worthless because it must be based upon facts assumed proven or to be proven, otherwise the opinion of the expert isn't of any value whatever.

Mr. KIBBEY.—We haven't gotten to our case yet to establish any facts.

The COURT.—I understand, but unless there is some evidence [263] tending to establish the fact assumed in the hypothetical question, it is improper

(Testimony of Robert R. Brownfield.)

to put it; and I don't understand the rule to be that you may assume—unless there is something in the record to indicate that that will be an issue—assume a fact not testified to by any witness.

Mr. KIBBEY.—Very well.

Mr. McFARLAND.—We think that is based upon facts in the case. If these facts do not exist either at present or subsequently—

The COURT.—The Court can't rule intelligently on any hypothetical question on the assumption that the testimony may hereafter be adduced to sustain such fact.

(By Mr. KIBBEY.)

Q. What is atrophy of the optic nerve?

A. It is a gradual destruction of the nerve elements—the vital elements of the nerve.

Q. What effect has it on the vision?

A. Absolute blindness, if it is complete.

Q. Can you tell simply by looking at the patient, or at one who may be afflicted by an atrophied optic nerve?

A. The only way I can tell is to examine it with the ophthalmoscope—examine the fundus of the eye—and only a man experienced in the use of the ophthalmoscope can tell it then.

Q. And sometimes not then? A. Oh, yes—

Q. But you didn't discover whether there was an atrophy or not?

A. Not in this case, no, because I couldn't see the fundus.

Q. What is the general result as to producing

(Testimony of Robert R. Brownfield.)

blindness, of an atrophied optic nerve—sudden or gradual?

A. Gradual, unless the injury severs the optic nerve, and [264] then the blindness comes before the atrophy.

Q. But suppose it is not severed?

A. Then it is gradual.

Q. If within two or three days after this injury there had been a hemorrhage in the eye, would you attribute it to nephritis resulting from that accident? Within that time could that develop?

Mr. SEABURY.—We object to the question as incompetent, irrelevant and immaterial, not a proper hypothetical question, not based upon facts proved in this case—no proof as to what time this hemorrhage took place at all. The question assumes that the hemorrhage took place two or three days after the accident, while the strong probability is that it occurred at once.

(By Mr. KIBBEY.)

Q. Then occurring at once—suppose it occurred at once at the instant of the injury, would you attribute it to nephritis? A. No.

Mr. SEABURY:—We object—incompetent and improperly formed.

The COURT.—I think that is proper cross-examination.

Mr. SEABURY.—We except.

The COURT.—Restate the question.

(By Mr. KIBBEY.)

Q. If the hemorrhage in the eye occurred immedi-

(Testimony of Robert R. Brownfield.)

ately at the time of accident, would you attribute it to nephritis?

A. Not unless he had nephritis before the accident.

Q. Then if nephritis can be looked to as a cause for that hemorrhage, it would have to be from a pre-existing nephritis? A. If nephritis—

[265] Q. If the hemorrhage was attributable to the nephritis, it would have to be attributable to a nephritis that was pre-existing?

A. Yes, I think that is true, but it might be due to increased blood pressure that existed at the time of the pneumonia or at the time of the accident, aside from the blow.

Q. Now, Doctor, suppose there was no blow upon the head at all, to what would you attribute the blindness?

A. In that case, if there was no blow on the head at all, and the blindness occurred from the accident—

Q. Now, you are assuming that it did occur—

A. Allow me to assume that it did occur, if I may. If the blindness or hemorrhage occurred from the accident, it would have to be due to increased blood pressure. Any time a man of Mr. Clark's age has an accident or is excited or frightened or angry, or anything of that kind, his blood pressure naturally suddenly increases, and that is the cause of apoplexy. Now, Mr. Clark had an apoplexy of the eye. It may have been caused from a direct blow, from a blow to some other part of the body, or nephritis, or

(Testimony of Robert R. Brownfield.)

any condition that might raise the blood pressure. I believe that is a pretty complete answer to the question?

Q. Yes. But that is still not incompatible with the fact that he may have a loss of vision long before.

A. It may have been, of course.

Q. And knowing nothing but the statement made by him of his history, you are disposed to attribute it to that accident?

A. Yes, sir. His history is very typical of hemorrhage.

Q. But hemorrhage could have occurred even prior to that accident?

[266] A. It could have; yes.

Q. And had hemorrhage of the eye occurred long prior to that accident, you would have found the eye in about the same condition as it is now?

A. Yes, sir. There is no way by which I can fix the time.

Q. You connect, then, the loss of vision as being attributable to that accident to some statement of his as to his condition before that?

A. Naturally, yes, sir.

Q. A man with vision gone as in this case could go about among his neighbors and associates without disclosing the loss of vision in that eye, may he not?

A. Yes, he may. He may be averse to telling of his infirmities.

Q. They are naturally averse to telling?

A. Yes, sometimes.

Q. From sensitiveness and from business reasons?

(Testimony of Robert R. Brownfield.)

A. Yes, he may have wished to return to his position.

Q. There would not be anything in his manner if he was disposed to conceal the fact, to indicate to the casual observer or even an acquaintance or associate the fact that he had lost the vision of one eye?

A. No, I don't think there is.

Mr. KIBBEY.—That is all.

Mr. SEABURY.—That is all.

(Witness excused.)

[Testimony of R. W. Craig, for Plaintiff.]

R. W. CRAIG, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name, Doctor?

[267] A. R. W. Craig.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been such?

A. Since 1895.

Q. Where do you now practice?

A. In Phoenix, Arizona.

Q. How long have you been engaged in practice here? A. Fifteen years.

Q. Tell us, please, Doctor, what your preliminary education has been as physician and surgeon.

A. I graduated at the Rush Medical College in 1895 and spent eighteen months as house surgeon at the Cook County Hospital as an interne.

(Testimony of R. W. Craig.)

Q. Since that time have you been actively and continuously engaged in the practice of your profession? A. I have.

Q. Have you been brought frequently in contact with cases of personal injuries?

A. I have seen a good many; yes, sir.

Q. Do you know the plaintiff, Mr. Clark, in this case? Thomas P. Clark.

A. I saw Mr. Clark the other day at my office.

Q. During the month of November, 1912?

A. Yes, sir.

Q. Were Dr. Dysart and Dr. Brownfield present at least part of the time you were there?

A. Yes, sir.

Q. Did you make an extended examination of him?

A. Yes, sir.

[268] Q. Please describe to the Court and jury what you found with reference to the physical condition at that time of the plaintiff.

A. I found that he had had an injury to the ribs of his right side, if I remember rightly, the third and fourth ribs had been fractured, and the evidences of the fracture are still there. He complained that he had some subjective symptoms of injury to the short ribs on the left side. I could never find any objective symptoms of injury there, but he complained constantly of tenderness when I was trying to attract his attention to something else so that he would forget it—so I assume he had an injury there on his short ribs.

Q. What, if anything, did you find with reference

(Testimony of R. W. Craig.)

to the condition of his kidneys?

A. All I know about that is the examination which Dr. Dysart made of his urine, which showed that he had a chronic interstitial nephritis.

Q. And that is ordinarily described as Bright's disease? A. Yes, sir.

Q. And that is of an incurable type in this instance, isn't it? A. Yes.

Mr. McFARLAND.—What is the answer?

The WITNESS.—In any instance. I will change that.

(By Mr. SEABURY.)

Q. Did you participate in the examination in reference to his eye?

A. Only in being present and hearing the conversation.

Q. You don't know, then, what the condition of his eye was, do you?

[269] A. No, I didn't examine his eye with the ophthalmoscope.

Q. Now, Doctor, tell us whether a fracture of the rib is a common or inducing cause of pneumonia, or not. A. It is—very common.

Q. Will you tell us whether nephritis is a common or inducing result of pneumonia?

A. In this way it is: people with acute infectious diseases of any variety of acute disease of any sort are prone to a consequent nephritis—so much so that in any acute case like typhoid and pneumonia we constantly watch the condition of the urine to see if they are developing nephritis, and in that way

(Testimony of R. W. Craig.)

I would say pneumonia is a cause of nephritis.

Q. Pneumonia is one of the so-called specific fevers? A. Yes.

Q. Isn't it a fact that all of the specific fevers may and frequently do result in a condition of nephritis?

A. Yes.

Q. Is there any way for you to tell how long this condition of nephritis had existed? A. No.

Q. Wouldn't the length of time in which that condition of nephritis had existed be indicated in at least the color of facial expression of the defendant?

Mr. KIBBEY.—We object to the question—he is cross-examining his own witness.

The COURT.—It is open to that objection.

(By Mr. SEABURY.)

Q. I will ask you to state what, if any, indications—external indications—there would be in a person's appearance indicating a condition of nephritis.

[270] A. With an acute nephritis, during the course of the first few weeks there would be no particular indications of it. As the nephritis extends over a term of years or months, a patient will usually become more or less anemic and pale and inclined to puffiness around the eyes. That is practically the only external appearance of nephritis you get.

Q. Do those conditions become more marked as the disease progresses?

Mr. BENNETT.—We object to the question as leading and suggestive. It is not necessary. Doc-

(Testimony of R. W. Craig.)

tor Craig is able to understand questions without being led.

Mr. SEABURY.—Every question is more or less leading, otherwise they would not be made. I am not desirous of asking leading questions.

The COURT.—I am of the opinion that the question is leading.

Mr. SEABURY.—I will change it.

(To the Witness.)

Q. What, if any, increased indications such as you have described, Doctor, come from this disease as it progresses?

A. Only an aggravation of the condition I have just described. As time goes on those symptoms become more pronounced—this appearance of anemia and puffiness.

Q. So that wouldn't the appearance of the patient at the time of your examination enable you to estimate the probable duration of his illness up to that time?

A. Only in a very vague way. I might have an opinion but couldn't base the opinion on any very good logic.

Q. Could you express an opinion as to whether or not this nephritis you found to exist in this case is of a long or short duration? [271] A. No.

Q. That could not be ascertained to-day?

A. I don't think so.

Q. Now, Doctor, assuming that Mr. Clark, when he was sixty-five years of age in March, 1911, was in a railroad collision, in which collision he received

(Testimony of R. W. Craig.)

a blow upon his head and his left shoulder and left hip; that he sustained a fracture of his ribs; that thereafter he had a case of pneumonia of which he was cured; could you say with reasonable certainty whether or not the condition of nephritis which you find now to exist was the natural and probable result of that pneumonia?

A. I should say it was extremely probable that it was the result of the pneumonia.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say you found an injury to the ribs on the right side?

A. That is my recollection of the examination.

Q. What condition did you find those ribs in?

A. There was a slight deformity with callouses that were thrown out at the time of the fracture.

Q. Where they healed? A. Yes.

Q. And practically well? A. Yes.

Q. You saw no difficulty other than the evidences of the fracture? A. That is correct.

Q. This nephritis is what is ordinarily known as Bright's disease? [272] A. Yes, sir.

Q. It acquired its name from the name of the man that is supposed to have discovered it?

A. I presume so; it is so old I don't remember.

Q. A couple of hundred years old?

A. Something like that, I should think.

Q. They are synonymous terms? Nephritis and Bright's disease?

A. Yes, sir—they are synonymous.

(Testimony of R. W. Craig.)

Q. Now, does Bright's disease ordinarily follow or result from pneumonia?

A. Sometimes it does.

Q. I say ordinarily.

A. I don't know as I understand your question. Do you mean that it is ordinarily true that every case of pneumonia is followed by Bright's disease, or that every case of Bright's disease—

Q. I mean, would you say that the fact that one had pneumonia that the reasonable probability would be that it would be followed by Bright's disease?

A. No.

Q. That is the exception rather than the rule?

A. Yes.

Q. So you wouldn't say that ordinarily Bright's disease would exist as a result of pneumonia ordinarily? A. No.

Q. But, on the contrary, would you say it might?

A. Taking a series of Bright's disease I wouldn't say that ordinarily it would result from pneumonia.

Q. If it did result it would be an exception to the rule? [273] And not the rule.

A. And not the rule.

Q. Wouldn't it depend to some extent upon the severity of the case of pneumonia?

A. I think not—not much. It wouldn't make much difference.

Q. Suppose a case of pneumonia developed—a mild case—typical pneumonia—and the patient was relieved of that trouble in a few days, would you say it would be a probability that nephritis would result?

(Testimony of R. W. Craig.)

A. A person is just as likely to have nephritis following a slight attack of infectious fever of any kind as a severe one.

Q. Then the degree wouldn't cut any figure?

A. Not in a general sense.

Q. Now, couldn't that disease occur from any other causes besides pneumonia?

A. Many others.

Q. Might occur from a severe case of bronchitis, mightn't it? A. Yes.

Q. Occur from a cold?

A. Yes—cold and bronchitis are practically synonymous.

Q. Isn't Bright's disease albumen in the urine?

A. You find albumen in the urine in Bright's disease.

Q. That is what practically constitutes Bright's disease?

Q. That is the common symptom—that is the symptom people generally recognize, although it involves many things besides albumen, and there are other things that produce albumen in the urine besides Bright's disease.

Q. But that is always present in Bright's disease?

A. Not always; no.

[274] Q. Is sugar present?

A. Sugar is never present in Bright's disease unless the patient has an associated diabetis.

Q. If this patient had a severe case of bronchitis previous to this accident, would you say that the pneumonia which set in was just as probable a re-

(Testimony of R. W. Craig.)

sult from that severe case of bronchitis as from any other cause—and probably more liable to have resulted from that?

A. That is a little bit vague. It would depend on when this bronchitis occurred. A pneumonia following an injury—particularly an injury to the chest—is most probably the result of the injury to the chest.

Q. Rather than the bronchitis?

A. Yes, I should think so.

Q. Suppose he had an acute trouble, or bronchitis, for a week or ten days before, and then the accident occurred and pneumonia set in, would you say it was from the injury to his body or from the bronchitis?

A. I would say it would be an utter impossibility to tell. Probably due to both.

Q. It might be due, though, from the bronchitis, might it not? A. Yes, I should think so.

Q. It might be due to the wounds he received?

A. Yes.

Q. In what condition did you find the other ribs that you examined?

A. I found no objective symptoms of any injury at all on the left side.

Q. So far as your observation and examination went, the injuries to the ribs were practically cured and well? [275] A. Yes.

Q. No trouble in that respect? So he was not suffering from any inconvenience or trouble as a result of these injuries?

A. I wouldn't like to say that, because as I ex-

(Testimony of R. W. Craig.)

plained a little while ago, he constantly complained of tenderness in the region of the short ribs on the left side, even while I was trying to attract his attention to something else. So I wouldn't like to say he wasn't suffering, although I found no evidence of injury there at the time I made my examination.

Q. You found no evidence? A. No.

Q. The only basis of that conclusion is his complaint? A. His complaint.

Q. And that alone? A. And that alone.

Q. Your examination would lead you to the contrary?

A. My examination was entirely negative so far as any injury to the short ribs on the left side.

Q. Then you would say as an expert that there was no difficulty present in those short ribs?

A. I didn't find any.

Mr. McFARLAND.—That is all.

(Witness excused.)

[**Testimony of Mrs. Thomas P. Clark, for Plaintiff.**]

Mrs. THOMAS P. CLARK (wife of plaintiff), being called as a witness in behalf of the plaintiff and duly sworn, is withdrawn from the witness-stand without testifying.

Mr. SEABURY.—If your Honor please, we will withdrawn Mrs. Clark and substitute another witness first.

The COURT.—Very well, you may do so.

[**Testimony of A. T. Thompson, for Plaintiff.]**

[276] A. T. THOMPSON, being called as a witness on behalf of the plaintiff and duly sworn, testifies as follows:

Direct Examination.

(By Mr. KEARNEY.)

Q. What is your name? A. A. T. Thompson.

Q. On March 15th, 1911, where did you live, Mr. Thompson? A. At Clifton, Arizona.

Q. What position, if any, did you then hold with the defendant in this case?

A. At that time I was the traffic manager, treasurer and secretary of the Arizona and New Mexico Railway.

Mr. KEARNEY.—If the Court please, I called this witness for cross-examination under provisions of section 2504 of the Revised Statutes of Arizona, 1901—for cross-examination.

Mr. KIBBEY.—That only applies to a party to the action.

(By Mr. KEARNEY.)

Q. Mr. Thompson, you heard the testimony about A. & S. cars being in the yards at Clifton on March 15th, 1911? A. Yes, sir.

Q. Are those the Colorado & Southern cars?

A. Yes, sir.

Q. Were those cars brought in from Gray Creek, Colorado?

A. I don't know where they were brought in from.

Q. They were foreign cars and not cars of the defendant? A. Yes, sir, they were foreign cars.

(Testimony of A. T. Thompson.)

Q. Brought in from a point outside of the territory of Arizona? A. Yes, sir, so far as I know.

Q. Those cars were consigned to the Shannon Copper Company, [277] were they not?

A. Yes, sir.

Q. Those cars were all wide gauge cars?

A. Standard gauge cars.

Q. At that time did the Shannon Copper Company own any wide gauge cars using that Shannon track?

A. Not that I know of. I don't think they have any standard gauge cars.

Q. Then the defendant company delivered those cars to the Shannon Copper Company's smelter up on the hill over the Shannon switch, did they not?

A. Yes.

Q. And at this time that Mr. Clark was moving those cars there then the defendant was in the act of delivering those cars and taking them up and delivering them to the Shannon Copper Company's smelter on the hill?

A. That is as I understand it.

Q. How much did the defendant pay for moving the cars—

Mr. McFARLAND.—We object to the question, for the reason that there is not allegation in the complaint upon which to base such testimony. The complaint says that the cars were consigned to the Shannon Copper Company at Clifton, and there is no allegation of any contract or agreement between the defendant and the Shannon Copper Company to do

(Testimony of A. T. Thompson.)

anything more with those cars than the fact of their consignment and delivery in the yards. I think, as the Court very correctly said the other day, before any agreement about anything that should be done by the defendant with those cars after they were delivered in the yards, now there must be some allegation to base the evidence on, and the fact that there is none, and no pretense of any, would not [278] authorize the introduction of evidence upon the matter—

The COURT.—The allegation in the complaint is that they were engaged in interstate commerce?

Mr. McFARLAND.—Yes, sir.

The COURT.—And as a common carrier.

Mr. McFARLAND.—Yes, sir.

The COURT.—The allegation is that—is the allegation that at the time of the accident these cars were en route between some point outside of the territory to Clifton?

Mr. McFARLAND.—To Clifton.

The COURT.—To Clifton?

Mr. McFARLAND.—I think so.

The COURT.—You may be right if that is true. There might be a variance, in other words.

Mr. McFARLAND.—If the object of this was to show that the defendant and plaintiff were engaged in interstate commerce in switching those cars in its yards at Clifton— Is that the object of it?

Mr. SEABURY.—I think the object of the testimony is quite apparent. We offer it for the purpose of showing that the company was not only a common

(Testimony of A. T. Thompson.)
carrier but also—

The COURT.—Let me have the complaint.

Mr. SEABURY. (Handing complaint to the Court.) —engaged in interstate commerce. I direct your Honor's attention to page four of the complaint, which shows that the consignment was to the Shannon Copper Company at Clifton. That is only descriptive of the location of the Shannon Copper Company at that place.

The COURT.—I think this allegation meets your objection, Mr. McFarland. (Thereupon the Court reads from page three of the [279] second amended complaint.)

Mr. McFARLAND.—Now, if the object of that question is to show that in the operation complained of, that the defendant was engaged in interstate commerce, so as to bring it within the allegations of the complaint, it might be material.

The COURT.—The Court could not rule it out if it is material in any aspect of the case.

Mr. McFARLAND.—In what other aspect could it be material?

The COURT.—As indicating that the company was engaged as a common carrier.

Mr. McFARLAND.—We admit that, but not in connection with this particular transaction.

The COURT.—And in this particular transaction.

Mr. KIBBEY.—No. They didn't haul anything up there except to deliver it to the Shannon Copper Company.

The COURT.—Isn't it a common carrier in doing

(Testimony of A. T. Thompson.)

that kind of business?

Mr. KIBBEY.—No.

The COURT.—If it is a common carrier then it comes within the provisions of the act of Congress of 1910.

Mr. KIBBEY.—Suppose it is a special carrier. It didn't bill things out of there and didn't engage in business of a common carrier.

The COURT.—Suppose it volunteers to do that, isn't it subject to all the liabilities of a common carrier? I shall not finally conclude that point at present, but my own impression now is that I shall overrule you on that point.

Mr. BENNETT.—Before the Court rules I should like to have the question read. I think it is objectionable.

(Thereupon the reporter reads the following question: [280] Q. How much did the defendant pay for moving the cars?)

Mr. BENNETT.—We think it is objectionable as being immaterial.

Mr. SEABURY.—We will substitute this question with the Court's permission, and yours, Mr. Kearney.

(To the Witness.)

Q. Did the defendant receive any pay or compensation from the Shannon Copper Company for moving cars up the Shannon switch on the 15th of March, 1911?

Mr. BENNETT.—We object to that question for the same reason. That it is irrelevant and immaterial.

(Testimony of A. T. Thompson.)

The COURT.—Doesn't it bear upon the question as to whether they were acting as common carrier?

Mr. BENNETT.—No; they may or may not have received any pay from the Shannon Copper Company. They may have been doing it for an accommodation.

The COURT.—You think the matter of pay does not determine the character of the carrier?

Mr. BENNETT.—Not at all, your Honor.

The COURT.—That is probably true. I can conceive that a railroad might be a common carrier even if they didn't charge anything for the specific service in which they might be engaged.

Mr. BENNETT.—That is true.

The COURT.—But it bears upon the point. It tends to indicate whether that is not part of their regular business.

Mr. BENNETT.—I think Mr. Clark testified that the Shannon Copper Company's engines and trains came down that switch and used that switch too. The testimony is that that was their line and that they used it as their railroad. Now, we can't conceive it would make any difference whether the Shannon Copper [281] Company paid anything in addition to the freight charge to Clifton for this service or not.

The COURT.—Suppose the question was as to the liability of the one company against the other. Suppose that they were independent lines. Isn't there proof here indicating that this accident—at least that

(Testimony of A. T. Thompson.)

this train of cars—was upon the main line of the road?

Mr. BENNETT.—Which train of cars?

The COURT.—It was at the switch. These cars that collided with this train, as I understand, were still upon the main track.

Mr. BENNETT.—The testimony distinctly is that the accident occurred after the train or engine—the cab of the engine—had passed the frog, which would be on the way up the switch.

The COURT.—Clark was a little uncertain just where it was. But, as I understand, the four cars that moved and which that shifting of the four cars substituted the proximate cause of the accident, were upon the main track.

Mr. BENNETT.—The cars which rolled were upon the main track, but the engine—

The COURT.—It wouldn't make any difference if the injury occurred on the other side of the mountain—but if the negligence—the proximate cause of the injury—occurred on the main track, it seems to me this question is academic.

Mr. BENNETT.—Then the question is not competent—it is immaterial.

The COURT.—It might be immaterial if there is no doubt as to that—might be some doubt as to that—might be evidence to indicate that that is not the case. Aside from that, as I say, I think the evidence is not objectionable upon the ground of its [282] immateriality. I think the matter of pay may not cut much figure in that matter characteriz-

(Testimony of A. T. Thompson.)

ing the service that was being rendered there, whether it was a common carrier or not.

Mr. SEABURY.—It seems to us, in view of the apparent difficulty and misunderstanding as to what concession the defendant made the reference to this defendant being a common carrier on that day, we ought to be permitted to prove that on the 15th of March, 1911, the defendant was a common carrier. It is now suggested that some relation of special carrier existed between the defendant and the Shannon Copper Company. It seems to me that on that issue alone we would have the right to show—not the amount of compensation that was paid—we only wish to show that a consideration was paid to the defendant for the transaction of that particular work. We offer it also on the ground that it tends to show the defendant was in complete control of the tracks—both of the main line and of the Shannon smelter—from which no hair-splitting question should come up as to whether the accident occurred right at the switch or whether the accident was the result of negligence that occurred upon the main line.

The COURT.—The Court has indicated that it sees nothing objectionable in the question, except that the mere matter of pay does not decide the matter.

Mr. SEABURY.—Does it not tend to establish that these persons were engaged in the business of a common carrier for hire?

Mr. McFARLAND.—We admit that.

Mr. SEABURY.—But the admission has been withdrawn.

(Testimony of A. T. Thompson.)

Mr. McFARLAND.—We have admitted and stated the admission on several occasions, that we were common carriers, but we do not admit that we were engaged in interstate commerce in switching [283] those cars up the Shannon switch or switching them in our yards.

Mr. SEABURY.—But is it admitted that you were engaged as a common carrier in switching those cars up Shannon switch?

Mr. McFARLAND.—Yes. We admit as far as an admission can be understood that we were engaged then and have been engaged in the business of common carriers. Now, there is no qualification to that.

The COURT.—Then I think the question is unnecessary.

Mr. McFARLAND.—But as to whether we were engaged in interstate commerce or not—

The COURT.—That is a question of law, almost.

Mr. SEABURY.—I was about to say that. So may we proceed with the question, your Honor?

The COURT.—I think it is unnecessary under that admission.

Mr. SEABURY.—The admission does not go to the question whether they were involved in interstate commerce. I think we have it fixed that in this case they were engaged as a common carrier and in the act of a common carrier.

The COURT.—But the question of payment does not bear on that, for that might be another contract—the hauling that stuff up there might be another con-

(Testimony of A. T. Thompson.)

tract than that involved in bringing the cars into the territory from some point outside.

Mr. SEABURY.—But, if your Honor please—

The COURT.—I think the question whether or not this movement of cars was under the one contract would bear upon that question. Whether the parties treated the service under the original contract at an end at the time the cars reached the station at Clifton, and this matter of subsequently hauling cars up to the smelter could be said to be an independent and distinct transaction or contract than that which was involved in the bringing of [284] the cars in in the first instance, would be the determinative question.

Mr. SEABURY.—We respectfully contend in that respect that whether or not this defendant was then engaged in the act of interstate commerce is not dependent upon contractual relations of this defendant with the Shannon Copper Company. That is our contention. While the contract might establish it beyond any doubt, it might, nevertheless, be established whether any contract existed or not, or irrespective of the terms of that particular contract. For the evidence is that these were twelve cars some of which were the property of the Santa Fe and some of the Colorado and Southern; that they contained coke coming from outside of the territory, and that the defendant was engaged in the transmission of those cars from the main line up this switch, which would clearly establish an engagement in interstate commerce.

(Testimony of A. T. Thompson.)

The COURT.—Suppose there was another company that took those cars after their arrival at Clifton and hauled them up to the smelter—would that be an act of interstate commerce?

Mr. SEABURY.—I am frank to say I don't know. I think that it would. I think the authorities are to the effect that where cars are consigned to an individual at a certain place that the persons engaged in the delivery of those cars are engaged in interstate commerce until the consignee is reached, and the engagement in interstate commerce does not cease simply by the delivery of cars at the place at which the consignee resides or has his place of business.

Mr. BENNETT.—Then is it your idea that a railroad company may be engaged in interstate commerce whose line is wholly within a state or territory?

[285] Mr. SEABURY.—Most assuredly.

The COURT.—That was discussed in the Merger Cases before the Supreme Court of the United States. There seem to be considerable doubt in the mind of the judges and also in the mind of counsel as to those questions. I don't think it is settled.

(Thereupon the question is argued further to the Court by counsel, at the conclusion of which the Court says:)

The COURT.—Without taking up any more time in the discussion of this question, I will admit the evidence tentatively, and if the Court feels that it is proper hereafter after an examination of the law, it

(Testimony of A. T. Thompson.)

can be taken from the consideration of the jury, by proper motion.

Mr. McFARLAND.—We desire to except to the ruling of the Court.

(By Mr. KEARNEY.)

Q. Was any compensation paid to the defendant for taking those cars up the hill and delivering them to the Shannon Copper Company?

A. I don't think so.

Q. You think it was gratis?

A. I don't think so.

Q. Didn't they pay anything?

A. It all depends on the nature of the movement, Mr. Kearney, I can't give you yes or no to that question the way you put it, because I don't know.

Q. Was there any consideration for the moving of those cars? A. I don't think so.

Q. You think there was no consideration?

A. No consideration for that original switching movement, provided that was an original movement.

Q. Wasn't that part of the duty to take those cars up there?

A. On the original switching movement?

[286] Q. Don't you take freight up there for other persons? A. Yes, sir.

Q. You say you take freight up there for other persons besides the Shannon Company?

A. I didn't quite catch that.

Q. I say, don't you take freight up the hill for the Shannon Copper Company and to other persons than the Shannon Copper Company?

(Testimony of A. T. Thompson.)

A. Up to the Shannon Copper Company hill?

Q. Yes. A. Yes, sir.

Q. There is an oil company you deliver oil for?

A. Yes, sir.

Q. Sometimes goods are taken for the D. C. Company and transported?

A. That is a through movement up above.

Q. They are taken up on the track—that track is used to take them up? A. Oh, yes.

Q. Does the defendant's engines and crew of helpers take those up? A. Yes.

Q. In that way there is quite a lot of other freight that is taken up that switch that goes to divers persons?

Mr. McFARLAND.—We object. That is not the question before the Court as to what others did, but as to the particular Shannon Company.

The COURT.—The practice of the company might bear upon that point.

Mr. McFARLAND.—As to whether they were paid or not?

[287] The COURT.—Oh, no. The question is as to the practice of the company in hauling other loads up the hill.

Mr. McFARLAND.—We except.

(Thereupon at request of counsel reporter reads the last question propounded to the witness.)

The WITNESS.—There is other freight. I wouldn't say a lot.

(By Mr. KEARNEY.)

Q. It goes to divers other persons?

(Testimony of A. T. Thompson.)

A. Yes, sir.

Q. Is this freight called foreign freight that comes in from outside of the territory or State?

A. It might be.

Q. Isn't it a fact that most all of it is? Do you get any wholly within the territory or State?

A. No, I don't think so. Most of the oil is interstate.

Q. Then you do take up a large amount of that, don't you?

A. Take up all that goes to the Texas Oil Company's plant up there.

Q. The Texas Oil Company has a plant up there?

A. Yes.

Q. Isn't it a fact they ship in a large amount of oil?

A. Quite a quantity—I don't know the tonnage they ship in.

Q. The fact is the Shannon Copper Company is what they call a large plant, isn't it?

A. Yes, sir.

Q. Who owns the Shannon switch running up to the Shannon Copper Company smelter—who owns that strip of railroad?

A. You ask me who owns the switch or the strip of railroad?

Q. The railroad.

A. The railroad is owned by the Copper Company from the switch to the Shannon plant.

[288] Q. Was it so owned on March 15th, 1911?

Mr. McFARLAND.—We object to the question.

(Testimony of A. T. Thompson.)

It is alleged that it is the property of the defendant. They can't prove one fact and allege another.

The COURT.—I don't know from the question what they are going to prove. They may be going to prove what they alleged in the complaint.

Mr. McFARLAND.—We except to the ruling of the Court.

(Thereupon at request of counsel the reporter reads the last question propounded.)

The WITNESS.—So far as my knowledge goes. (By Mr. KEARNEY.)

Q. Didn't the defendant in this case own an interest in that railroad? A. No.

Q. But they used it and controlled it at that time?

A. They used it—they had no control over it.

Q. All the engines that went up there went up there with the engines of the defendant and their employees operating those engines? A. Yes, sir.

Q. So they were the only ones using that then—the defendant's employees and their engines?

A. I don't know that they were the only ones using it.

Q. The only ones using it on the broad gauge?

A. On broad gauge, yes.

Q. So all foreign cars with broad gauge had to be taken up there by the defendant in this case?

A. Yes, sir.

Q. And were taken up by the defendant?

A. Yes, sir.

[289] Q. Now, isn't it a fact that when the defendant took cars up there, that they took them up with

(Testimony of A. T. Thompson.)

their own crews, and that they were in control of the switch and of that road in moving those trains?

A. Yes, sir.

Q. It is a fact? A. Yes, sir.

Q. What is the length of that Shannon switch up to the Shannon smelter? A. I don't know.

Q. Do you know whether it is a mile or a half a mile?

A. Oh, I should probably say it was probably about between three quarters and a mile.

Q. And is the Shannon Copper Company and all of that switch railroad within the corporate limits of the town of Clifton?

A. So far as my knowledge goes, yes. I never looked at the map, but I should say from a general idea, yes.

Q. You have lived at Clifton a good many years?

A. Yes, sir.

Q. What arrangements, if any, was there between the Shannon Copper Company and the defendant—was the defendant permitted to use that track to take cars up there?

Mr. BENNETT.—We object to the question as incompetent, irrelevant and immaterial.

The COURT.—There is an allegation in their complaint here directly on that point (reading): "Said switch line of railroad during the time herein mentioned was in use of defendant as part of its said railroad." I think they have a right to prove that.

Mr. BENNETT.—They are going again into the question of compensation.

(Testimony of A. T. Thompson.)

[290] The COURT.—The question doesn't necessarily apply to compensation.

Mr. BENNETT.—No, it does not, but I took it so to mean.

The COURT.—You may answer.

Mr. BENNETT.—We except.

The WITNESS.—It was the same as any other industrial siding put in there to connect up an industry with the main track. Outside of that there was no other arrangement.

(By Mr. KEARNEY.)

Q. Well, what was such arrangement as you had with every other industrial concern—what was the substance of it, briefly?

A. An arrangement regarding the delivery of cars governed by published tariffs of the company. They publish a terminal tariff that gives the rates for switching or what delivery they are going to make on an industrial siding on the original movement of the cars, and that constitutes the only contract which is a published contract.

Q. The fact is there is an established rate for the switching of these cars on the siding?

A. When you say these cars you mean these specific cars?

Q. I mean any cars brought up there, including these cars. All cars.

A. I will explain the arrangement. A car is brought in—what we call the original movement of the car—to make delivery of the original movement of the car—a carload of freight. If it is consigned to

(Testimony of A. T. Thompson.)

some consignee who has an industrial track the delivery is made on that industrial track—no additional charge made for the movement of that car at all. But if the car is brought into Clifton and then switched around after being placed at the original unloading point, if there is a further [291] switching movement of that car then we make a charge for that movement or any subsequent movement.

Q. But in this instance your charges for bringing the cars in from your road, that came up here from Hachita into Clifton, and doing the switching and taking them out on this industrial track to the Shannon Copper Company, the first charge included the extra service of switching them?

A. For the original movement, yes, sir.

Q. All considered as one? A. Yes, sir.

Q. Then the destination of the cars would not be deemed completed until delivered to the consignee, in this instance the Shannon Copper Company on the hill?

Mr. BENNETT.—That is a question of law, we think, and not for the witness to answer. He has stated the fact.

The COURT.—He may state what the practice is and how they regarded the contract—how they construed the contract. I don't see how the Court could determine that without the aid of some proof on the subject.

Mr. BENNETT.—The witness has testified what the contract is and what they do.

The COURT.—Yes, that may be true—he has

(Testimony of A. T. Thompson.)
stated what the practice is.

(To the Witness.)

Q. You say there was no other published contract aside from what you speak of in the tariff—what do you call it?—the tariff sheet.

A. The terminal tariff was what I referred to.

Q. Aside from that there is no other written agreement? A. No, sir.

[292] Mr. KEARNEY.—I asked the witness to state if the compensation in the first instance for moving the cars from Hatchita over the line of the road was not also included in the delivery of the car upon this siding—upon this switch—to the Shannon Company.

Mr. BENNETT.—And we object to that as already asked and answered.

The COURT.—He has answered it. You are asking this witness to decide this point of law.

(By Mr. KEARNEY.)

Q. Is the original movement of the car also included within the delivery on the switch?

Mr. BENNETT.—We object to that as calling for a question of law.

The COURT.—Whether the contract—

Mr. KEARNEY.—No, the original movement. He has testified that they have two kinds movements. What we seek to find out from this witness is whether or not the delivery of these cars on the industrial siding of the Shannon Copper Company was included within the contract involving the original movement of those cars.

(Testimony of A. T. Thompson.)

The COURT.—He may state whether it was treated as such by the company.

The WITNESS.—Say those cars are shipped from Gray Creek, Colorado, to Clifton, Arizona. The freight rate applied would be in a certain tariff which is on file with the Commission—in a different tariff—and the terminal tariff would be the charges or arrangements with reference to this switching. The original tariff, if you were to look up to find out a rate from Gray Creek, Colorado, to Clifton, would give the through rate, and then if you wanted to find out whether they had to pay an additional [293] charge to get those cars switched to an industrial siding, you would have to refer to the terminal line's terminal tariff to ascertain that, because all roads don't perform that service. Some do and some don't.

Q. Both classes of tariff are regulated by the interstate commerce commission, are they not?

A. My opinion is they are.

Q. And that applies, as you have said, to both terminal roads and other roads. What we want to find out, Mr. Thompson, is whether the delivery of these particular cars on the 15th of March, 1911, was a part of the original movement of these cars as you have described here, and whether the rate applicable to the original cars under the original movement applied to these cars or not.

A. On account of our terminal tariff providing that the original movement provided we would deliver to the industrial track without charging anything ad-

(Testimony of A. T. Thompson.)

ditional, we made it a part—linked it to the other tariff providing the rate from the point of origin to point of destination.

Q. So the fact is your delivery was not complete until you delivered to the industrial siding of the Shannon Copper Company.

A. It was optional with the Shannon Company whether they accepted delivery anywhere provided in that tariff.

Q. But in this instance, March 15th, 1911, defendant undertook to make delivery up that switch. They can't be any doubt or dispute about that, can they?

A. No, that is where we were going to make delivery.

Q. And when you say the defendant received no compensation for the delivery, you meant it received no specific compensation for going from the switch up to the smelter?

[294] A. Yes, we received no compensation on that original movement.

Q. You received one general compensation which included the so-called original movement of the car and which included the delivery to the smelter.

A. I don't say the rate we make from Gray Creek to Clifton takes into consideration any terminal switching—a remuneration to the terminal line for switching.

Q. No, I understand—

A. I thought that is what you meant.

Q. You do not, however, claim that the defendant

(Testimony of A. T. Thompson.)

received any compensation for the delivery of that movement of cars to the Shannon Company?

A. We delivered it free.

Q. But you received your compensation from the shipper?

A. We received our division of the through rate between the point of origin and destination.

Q. Yes, compensation was paid for that delivery.

A. I don't understand you. If you mean was there any additional compensation or any portion of the original rate applied to that service—

Q. No such question, Mr. Thompson. The question I am trying to get an answer to is this: Did the defendant receive compensation from someone for the delivery of those cars up to the Shannon Smelter?

Mr. BENNETT.—I think the witness has answered that question. He has said the rate from the initial point of shipment was included in the through rate, and they made delivery without charge.

The COURT.—Yes, you are asking him to draw an inference which the Court and jury is to draw.

Mr. SEABURY.—I think it is perfectly clear from this witness' [295] testimony what the arrangement was, but I don't want to leave it in any doubt.

(To the Witness.)

Q. I ask you, Mr. Thompson, whether you know—in March, 1911, did the defendant ship any freight from the Shannon Smelter out of the Territory?

A. Yes, sir.

Mr. MCFARLAND.—That is not involved in this

(Testimony of A. T. Thompson.)

controversy. We object to the question.

The COURT.—I overrule the objection.

(By Mr. SEABURY.)

Q. You have been in attendance upon the trial right along? A. Yes, sir.

Q. Have you heard the cars described which were involved in this collision on the 15th of March, 1911?

A. Yes, sir.

Q. You know from whence they came?

A. You mean the shipping point?

Q. Yes. Do you know where they came from?

A. From the evidence, from Gray Creek, Colorado—that is what I gathered from the evidence.

Q. Do you know anything about where they came from?

A. I think very likely they came from Colorado, but I haven't looked up the way-bills at all.

The COURT.—Are you through with the witness?

Mr. SEABURY.—Yes, your Honor.

Cross-examination.

(By Mr. McFARLAND.)

Q. Isn't this industrial switch that you speak of from the main line up to the Shannon smelter used in switching cars from [296] the main line and from the yards of the defendant up to the Shannon smelter?

Mr. KEARNEY.—We object to the question on the ground that it is not rebuttal. I called the witness for cross-examination.

The COURT.—It is not cross-examination except in the sense that you are permitted to apply the rules

(Testimony of A. T. Thompson.)

of cross-examination. Cross-examination, strictly speaking, pertains to something that has already gone in evidence.

Mr. SEABURY.—We think the question if admissible at all, should be addressed to the witness when called in behalf of the defendant and not on behalf of the plaintiff.

The COURT.—They may be making him their own witness for this point. They may interrogate him now, if they wish. Of course you make the witness your own witness.

(Thereupon at the request of counsel the reporter reads the last question propounded.)

The WITNESS.—Yes, it is so used.

(By Mr. McFARLAND.)

Q. The switching operation on this industrial spur or switch, is that done by the switching crew?

A. Yes, sir.

Q. You have two crews on the railroad, one a train crew and one a switching crew? A. Yes, sir.

Q. And when cars are brought in from the outside the train crew has nothing further to do with them after they are landed in the yards?

Mr. SEABURY.—We make the same objection.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except to the ruling of the Court.

[297] (By Mr. McFARLAND.)

Q. After the train is brought into the yards of the company at Clifton the train crew have nothing further to do with the train? A. No, sir.

(Testimony of A. T. Thompson.)

Q. Then it is turned over by that crew to the switching crew, isn't it?

Mr. SEABURY.—We object.

The COURT.—I think he has already answered that question.

By Mr. McFARLAND.—All right. I withdraw that.

(To the witness.)

Q. You have yard limits up there? A. Yes, sir.

Q. The switching from the main line up this industrial spur to the Shannon smelter is within the yard limits of the defendant at Clifton?

A. Yes, sir.

Mr. SEABURY.—We object to all these questions as leading. I understand this witness is really under direct examination.

The COURT.—It is leading, but a physical fact like that would not be probably suggested by any question of this sort. It is not probable that the witness would misrepresent anything of that sort, under the circumstances.

Mr. SEABURY.—We make the objection more for the questions that might follow.

Mr. McFARLAND.—I think that is all.

(Witness excused.)

The COURT.—We will take a recess until half-past one o'clock and meanwhile the jury will bear in mind the admonition of the Court not to suffer anyone to talk to you about the case or to talk about it among yourselves.

[298] (Thereupon the Court takes a recess.)

(Testimony of Mrs. Thomas P. Clark.)

At one-thirty P. M. this day, both parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, the jurors return into court and are called by the clerk, all answering to their names, and thereupon the following further proceedings are had herein, to wit:

**[Testimony of Mrs. Thomas P. Clark, for Plaintiff
(Recalled).]**

Mrs. THOMAS P. CLARK, being recalled to testify as a witness in behalf of the plaintiff after having been heretofore duly sworn in this case, testifies as follows:

Direct Examination.

(By Mr. SEABURY.)

Q. What is your name?

A. Mary Josephine Clark.

Q. You are the wife of Thomas P. Clark, the plaintiff in this action? A. I am.

Q. How long have you been married to Mr. Clark?

A. I think it is nearly seventeen years.

Q. You remember the 15th of March, 1911?

A. Yes, sir, I do.

Q. Please tell us what occurred on that day with reference to Mr. Clark.

A. I was sitting in my house—I heard a slight noise on the front walk and I looked out and I saw Mr. Clark approaching, hardly able to walk, apparently. I went out to him. I asked him what was the matter and he said that he had got hurt—

Mr. McFARLAND.—We object to any conversation. Let her state what she saw and what she

(Testimony of Mrs. Thomas P. Clark.)
knows. We object to any conversation.

The COURT.—Yes, as to the cause of the accident. As to the plaintiff's physical condition, that is admissible.

[299] Mr. McFARLAND.—Yes, but as to any conversation on that subject—

The COURT.—On what subject?

Mr. McFARLAND.—On the subject of his injuries—what he told her on the subject.

The COURT.—As to the cause of them, yes, but not as to how he felt and all that. I think that is admissible—part, almost, of the *res gestae*.

Mr. McFARLAND.—We except as to the conversations.

The COURT.—Of course, Judge, I don't rule that conversations as to the cause of the accident may go in, but simply what he may have said about his condition.

(By Mr. SEABURY.)

Q. Try to tell us what you observed with reference to him as distinguished from what he may have said to you.

A. He was very pale and I went to him and assisted him up the steps. I proceeded at once to get some water and bathe his face and take off the engine grime and dirt and his overclothes.

Q. Did you bathe him after that? A. Yes, sir.

Q. What else did you do?

A. I helped take off his clothing to be examined. Dr. Dietrich came on the scene and he proceeded to make an examination upon which Mr. Clark fainted

(Testimony of Mrs. Thomas P. Clark.)

dead away. Dr. Dietrich and myself got him to the bed.

Q. Now, Mrs. Clark, will you tell us whether or not you observed any inflammation in his left eye or either eye?

A. The eye was quite red and there was some blood on the cheek under the eye.

Q. Could you say from what portion of his face the blood came?

[300] A. Well, it was on the left side of the face.

Q. Was there any cut on his face?

A. Not that I remember.

Q. What was the appearance of the eye?

A. It looked red.

Q. Did there appear to be any blood in the eye at that time?

A. Well, I think there was a small amount of blood.

Q. What did you observe with reference to his head, if anything?

A. Well, I can't say at that time that I noticed anything very particular about the head.

Q. Did you or did you not observe whether it had been cut? A. No, sir, I did not.

Q. Are you able to say whether it had struck anything or not?

A. Well, there was a lump on the back of the head.

Q. There was? A. Yes, sir.

Q. Did you feel that yourself? A. I did.

Q. Had it been there before? A. No, sir.

Q. What did you do for him that day after he had gone to bed?

(Testimony of Mrs. Thomas P. Clark.)

A. I made him as comfortable as I knew how. I sponged him and sat there beside him. During the night he was delirious—not all the time—his sleep was broken and flighty.

Q. How long did that condition last?

A. That lasted all through that night.

Q. What took place the next day?

A. I had a trained nurse by half-past ten or eleven next day.

Q. What was her name?

[301] A. Rebecca Manes.

Q. She remained with him in attendance with you for how long about? A. For eight days.

Q. When did Mr. Clark get up after he went to bed on that occasion?

A. I think it was very near a week at which time he was permitted to sit up a little while.

Q. Did pneumonia develop? A. Yes, sir.

Q. When did it develop?

A. It was either the second or third day after the accident.

Q. What was done to Mr. Clark during that period of time in the way of treatment, if you know?

A. The first three days?

Q. Yes.

A. I don't remember whether they bandaged the ribs in the first three days or not, but I think probably.

Q. How was he bandaged during that time?

A. With adhesive plaster.

Q. Over what portion of his body?

(Testimony of Mrs. Thomas P. Clark.)

A. Down over the floating ribs.

Q. On which side?

A. All around, the bandages were put.

Q. Did he have any other treatment that you recall in the early stages of his difficulties?

A. The nurse continued the treatment I had commenced with regard to the eye. I bathed it with a solution of boracic acid. The next morning after the accident it was a hard matter to get the eye open. It took quite a long time to bathe it in order [302] to do so.

Q. What was the condition of the right eye at that time, do you recall? Was it open or closed?

A. It was open.

Q. About how long did the treatment of pneumonia continue, do you recall?

A. Well, it must have been five days, I think.

Q. About five days? A. I think so.

Q. During that time was Mr. Clark conscious all the time?

A. Pretty much all the time. There were times at night he was a little flighty.

Q. Do you recall about when he began to sit up?

A. I think it was about the sixth day.

Q. Do you recall his reading part of the time when he was sitting up?

A. It was when he commenced to sit up that he asked for a paper.

Q. And about how much reading, if you know, did he do from then on?

A. Well, a little. He would be restless in bed and

(Testimony of Mrs. Thomas P. Clark.)

would ask for the paper or something to look at. He was very restless.

Q. Do you recall whether or not he ever complained to you with reference to pain from his eye?

A. He certainly did.

Q. Do you recall when that was?

A. He complained the first day.

Q. He did? A. Yes, sir.

Q. Did he frequently refer to it, too?

[303] A. Yes, sir.

Q. Now, after he was able to sit up, do you recall how long it was before he was able to go out, or did he go out?

A. I think it must have been more than two weeks or such a matter that he went out. He went out in the yard and walked a little while.

Q. What, if any, differences did you observe in his general appearance and health after he went out after the accident and before it occurred?

A. After the accident and since he has never regained his usual voice at all.

Mr. McFARLAND.—Regained what?

The WITNESS.—His usual voice.

(By Mr. SEABURY.)

Q. What other differences?

A. He suffers from the pain in the chest and side and back, and also in the hip.

Q. Do you recall Mr. Clark's ever having been ill during the thirteen years preceding this accident?

A. No, sir, Mr. Clark never was ill.

Q. During that time? A. During that time.

(Testimony of Mrs. Thomas P. Clark.)

Q. You have been with Mr. Clark continuously since the accident, too, haven't you? A. I have.

Q. Has he ever received any other injury than those he received on the occasion of this accident since? A. No, sir.

Q. Has he been employed at any time since the accident, Mrs. Clark? [304] A. No, sir.

Q. Do you know whether or not he has made any efforts to secure employment?

A. I don't think that he has. I am sure that he hasn't.

Q. You don't think that he has?

A. No, sir. He is not able, I should judge.

Q. Do you recall what expenditures you or Mr. Clark made on account of his injuries since the accident?

Mr. MFARLAND.—I think that should be limited to what Mr. Clark expended.

The COURT.—If she knows of her own knowledge.

(By Mr. SEABURY.)

Q. I will put it what Mr. Clark expended, then.

A. To the best of my knowledge I can't say accurately.

Q. You know of certain payments having been made? A. Yes, sir.

Q. Please tell us of those you do recall.

A. There was Dr. Cathcart in El Paso.

Q. Do you recall how much was paid to him?

A. I can't say exactly, but I think between twenty-three and thirty dollars.

(Testimony of Mrs. Thomas P. Clark.)

Q. It was at least twenty-three dollars, was it not?

A. Yes, sir.

Q. What other payments do you recall?

A. Dr. Fayles.

Q. How much was he paid?

A. Two hundred and twenty-five dollars.

Q. How much?

A. Two hundred and twenty-five.

Q. Any others that you recall?

[305] A. Dr. Burns, of Los Angeles.

Q. How much was he paid?

A. About twenty-five dollars, I think.

Q. Anything else?

A. Dr. Satterlee of El Paso.

Q. How much was he paid?

A. Between thirty and thirty-two; such a matter, I believe.

Q. Anyone else that you recall?

A. Dr. Kendall.

Q. How much was he paid?

A. I don't know exactly. I think twelve or fifteen dollars.

Q. Would it be at least twelve? A. Yes, sir.

Q. Anyone else that you recall?

A. The nurse was paid.

Q. That is Mrs. Manes? A. Yes, sir.

Q. How much was she paid?

A. Twenty-five dollars and forty cents.

Q. Do you recall anyone else?

A. Dr. Birch, nine fifty.

Q. Any others?

(Testimony of Mrs. Thomas P. Clark.)

A. There was the expense of going to California.

Q. What does that amount to?

A. Well, without the living expenses, I suppose in the neighborhood of two hundred and fifty or sixty dollars.

Q. Whereabouts in California did you go?

A. To San Francisco.

Q. Why did you go to San Francisco?

A. The Doctor advised that Mr. Clark be taken away from the [306] scene of his accident in order to regain his nerves and to improve.

Q. What, if any, suggestion did he make as to the place he should go?

A. Well, I don't remember, except to go to California.

Q. When was that that he went to California?

A. I think it was in August, 1911, that the first trip was made.

Q. How long did you remain?

A. I think about four months.

Q. Then where did you go?

A. I returned to our home in Clifton.

Q. Did you subsequently return to California?

A. Yes, sir.

Q. Whereabouts in California did you go back to?

A. I went back to San Francisco again.

Q. When was that, Mrs. Clark?

A. I think that we left Clifton on June 14th or 15th, 1912.

Q. And when did you return?

A. Well, I think October 24th, or 25th.

(Testimony of Mrs. Thomas P. Clark.)

Q. Was the expense of the latter trip included in this sum of two hundred and sixty dollars?

A. Yes, sir.

Q. Now, during that time were you still in attendance on Mr. Clark? A. Yes, sir.

Q. Were there any other items of expense that you recall that Mr. Clark paid out on account of this injury?

A. Yes, there were drugs at different times.

Q. What do you think those payments amounted to?

[307] A. Well, at different times, I think, to seventeen or eighteen dollars.

Q. Anything else?

A. That is all I think that I remember.

Mr. SEABURY.—I think that is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You didn't see Mr. Clark at the time of the accident? A. At the scene of the wreck?

Q. Yes. A. No, sir.

Q. And didn't see him until after he came home?

A. Not until he came in the yard.

Q. Did anyone assist him after he got into the yard to walk into the house? A. Only myself.

Q. Just yourself? A. Yes, sir.

Q. He didn't walk any part of that way himself, from the front part of the yard to the house?

A. Part of the way he walked by himself; yes, sir.

Q. Dr. Dietrich was there the first day, was he?

A. Yes, sir.

(Testimony of Mrs. Thomas P. Clark.)

Q. Was he the physician who treated him in his trouble? A. Yes, sir.

Q. Were you present at any time when Mr. Clark and Dr. Dietrich were talking about his bruises and injuries?

A. I didn't hear Dr. Dietrich mention his bruises.

Q. Did you hear Mr. Clark tell Dr. Dietrich about his troubles? A. I did not.

[308] Q. About his broken ribs or about his injury to his hip? A. He spoke about—

Mr. SEABURY.—Never mind what he spoke about. Just answer the question, Mrs. Clark. Please don't tell him anything except the answer to the question. He has only asked whether you were present.

(Thereupon at the request of counsel, the reporter reads the following: Q. Did you hear Mr. Clark tell Dr. Dietrich about his troubles? A. I did not. Q. About his broken ribs or about his injury to his hip?)

Mr. SEABURY.—We object to that as calling for the conversation of the witness and the physician which would not be binding upon the plaintiff, and as also calling for the conversation between the plaintiff and his physician, admittedly relating to the subject of his injuries, which is a privileged communication.

The COURT.—It would be so far as the doctor is concerned, but not so far as third persons are concerned.

Mr. SEABURY.—That is true, but it appears that this third person is the wife of the person whose ad-

(Testimony of Mrs. Thomas P. Clark.)

mission is sought to be proved. We claim further in that respect that it is practically a communication between husband and wife.

The COURT.—Don't you think the party may be asked himself what he said to the doctor?

Mr. SEABURY.—No, I don't, under proper objection. I think that is the very purpose of the statute, to save patients from the disclosure of their communications between themselves and their professional advisers, either lawyers or doctors.

The COURT.—I have no doubt that the physician may not be interrogated except by consent of the patient—testify as to professional communications; but the fact may be otherwise shown, [309] of course—it may be without violating that rule.

Mr. SEABURY.—We also object on the additional ground that this is not within the scope of proper cross-examination—no such conversations were elicited from the witness on direct examination.

The COURT.—She was interrogated as to what—

Mr. SEABURY.—Only what she observed—not as to any statements made between doctor and patient.

The COURT.—She was interrogated, though, as to what Mr. Clark may have stated to her. However, the objection is sustained. I don't think that is proper cross-examination.

Mr. McFARLAND.—To which we except.

(To the Witness.)

Q. Mrs. Clark, were you present at any time that Mr. Clark made a statement—any statement—to Dr. Dietrich in reference to his physical injuries re-

(Testimony of Mrs. Thomas P. Clark.)
ceived as a result of that accident?

Mr. SEABURY.—We object. The question calls for a statement by the witness practically of that portion of the conversation—in other words, the substance of the conversation was given—were you present at the time a conversation relating to this subject was had?

Mr. KIBBEY.—Why not?

Mr. SEABURY.—The contention is that the witness is incompetent to testify to it.

Mr. KIBBEY.—Of course, Clark himself can't claim the privilege that he can't be interrogated about it—the statute doesn't exempt him—he is not privileged from disclosing it—it is applicable purely to the physician.

The COURT.—That is my understanding of the rule.

Mr. KIBBEY.—If we can prove otherwise that he made statements [310] to the doctor in the presence of someone else, it would not be a privileged communication. In the second place, we have a right to ask him these questions; we have a right to ask her the question as to what statements he might have made to the doctor in her presence, or whether she heard any statements made by the plaintiff to the doctor in her presence and in the presence of the doctor. She was asked about complaints made to her, and we have a right to go still further. The objection can't be that it is a communication between husband and wife—they have opened the door for this.

(Testimony of Mrs. Thomas P. Clark.)

Mr. SEABURY.—We still further urge the objection first on the ground that it is not proper cross-examination—

The COURT.—I think that objection is good, unless she was interrogated as to what he may have said about his physical condition.

Mr. SEABURY.—I think there is no such inquiry in the direct examination.

Mr. KIBBEY.—We are inquiring about statements made by the plaintiff, a party to this suit.

The COURT.—But she has not been interrogated as to that. You would have to make this witness your own as to that matter unless it is proper cross-examination.

Mr. KIBBEY.—We except to the ruling of the Court.

The COURT.—If that question was asked, it is cross-examination. If she was asked as to what statement she may have heard the defendant make—the plaintiff—not what he may have said to her, but what he may have said as to his physical condition.

Mr. McFARLAND.—In her presence.

The COURT.—Yes—then cross-examination is proper on that subject.

[311] Mr. KIBBEY.—That is what we are asking.

The COURT.—That matter was denied, and I took it for granted you conceded that. Do you claim, Judge Kibbey, that the record shows she was interrogated as to statements Clark may have made generally?

(Testimony of Mrs. Thomas P. Clark.)

Mr. KIBBEY.—As to pain and suffering, yes.

The COURT.—I didn't so understand. Mr. Seabury raised the issue as to that and I thought it was conceded he was right. I said repeatedly that if she was so interrogated that is cross-examination, otherwise it is not. Now, what is the record as to that?

Mr. KIBBEY.—My understanding of the record is that he did make complaint as to pain and suffering.

Mr. SEABURY.—My distinct recollection of the question is, what, if any pain did he express to you? That is my recollection of the substance of all her examination. I certainly didn't endeavor to prove by this witness anything that took place between Mr. Clark and the doctor. I have asked her to give only her personal observation of what she observed with reference to his physical condition after the accident.

Mr. KIBBEY.—The Court declared the rule to be that it was part of the *res gestae*.

Mr. SEABURY.—I modified my question and asked her to tell what she observed as to his physical condition. I didn't mean to extend the examination to let in questions about conversation with other persons. I feel quite confident that is the condition of the record.

The COURT.—I will ask the reporter to read the first part of Mrs. Clark's testimony.

(Thereupon the reporter reads the first part of direct examination of the [312] witness, Mrs. Thomas P. Clark.)

The COURT.—I sustain the objection that it is

(Testimony of Mrs. Thomas P. Clark.)

not proper cross-examination.

Mr. McFARLAND.—We except to the ruling of the Court.

(To the witness.)

Q. Did I understand you to say in your examination in chief that Mr. Clark complained of any pain in his eye or other wounds received in that accident?

A. Yes, sir.

Q. You did say that, in your examination in chief?

A. I don't quite understand.

Q. You did make that statement in reply to questions asked by Mr. Seabury?

A. That he had pain?

Q. Yes.

The COURT.—(To the Witness.) The question is whether you have stated in your examination up to this time— (To Counsel.) What is the purpose of that, Judge McFarland?

Mr. McFARLAND.—To show the condition—

The COURT.—We have just read the record and the Court has just ruled on that point.

(Thereupon the reporter at the request of counsel reads the latter portion of the direct examination of the witness, Mrs. Thomas P. Clark, including the following: Q. (See page 169.) Do you recall whether or not he ever complained to you with reference to pain from his eye? A. He certainly did.)

The COURT.—You may put another question. This statement pertains to the condition of the eye. The Court will then rule again upon that matter.

(Testimony of Mrs. Thomas P. Clark.)

(By Mr. McFARLAND.)

[313] Did Mr. Clark in your presence complain—in your presence and in the presence of Dr. Dietrich—complain about any pain in the eye during the first week of his illness at your house?

Mr. SEABURY.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—I overrule the objection as to that.

Mr. SEABURY.—Also on the grounds already urged.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except to the ruling of the Court.

The WITNESS.—I don't remember.

By Mr. McFARLAND.—Were any statements made by Mr. Clark in the presence of yourself and Mrs. Manes as to pains in his eye?

A. As far as I remember he complained of that pain in the eye.

Q. I speak, Mrs. Clark, particularly in reference to the presence of Mrs. Manes, the nurse.

A. As far as I remember, he did.

Q. He did?

A. I think so. I wouldn't be positive of it.

Q. Wasn't it discussed there in the presence of the nurse and Dr. Dietrich and yourself?

Mr. SEABURY.—We object to the question as not proper cross-examination and as calling for a statement of conversations between physician and patient during the existence of the relation, and while it is apparent the conversation must have been

(Testimony of Mrs. Thomas P. Clark.)

necessary to enable the physician to treat the patient, and that the physician received the information while the relation existed, in violation of the statute.

The COURT.—I overrule the objection.

[314] Mr. SEABURY.—We except.

The WITNESS.—I can't recollect. I don't remember what the conversation was, or if there was any, to the doctor.

(By Mr. McFARLAND.)

Q. You won't say there was no conversation along those lines in the presence of these people?

A. I wouldn't like to say. I don't remember whether there was or not.

Q. Did Dr. Dietrich continue to treat him until he was up out of his bed and out of the house?

A. Yes, sir.

Q. Was he treated by any other physician except Dr. Dietrich?

A. No, sir, except one time Dr. Smith was called in in the absence of Dr. Dietrich.

Q. That was only one time?

A. That is all that I remember.

Q. Were you present at that time?

A. I was in the next room.

Q. You knew that Dr. Smith was in there?

A. Yes, sir.